18-352 Affirmed
Dec 16, 1873 Judg Davis.
Justice Miller
Dissents

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 480.

THE TOWN OF OHIO, PLAINTIFF IN ERROR,

vs.

GEORGE O. MARCY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 23, 1873.

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1 , Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, circuit judge of the United States for the seventh judicial circuit, on Wednesday, the twelfth day of March, in the March term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

GEORGE O. MARCY
vs. } 10514. Assumpsit.
THE TOWN OF OHIO.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 26th day of August, in the year of our Lord one thousand eight hundred and seventy-two, came George O. Marcy, plaintiff, by Paddock and Ide, his attorneys, and filed in
2 the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district aforesaid, his præcipe for a writ of summons against The Town of Ohio, defendant; and also at the same time filed his bond for costs in said-entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA, *ss:*

Northern district of Illinois, circuit court.—October term, A. D. 1872.

GEORGE O. MARCY
vs. } Assumpsit.
THE TOWN OF OHIO.

Please issue process against the def't in the above-entitled cause to the marshal for the northern district, returnable at next October term of said court. Lay damages in assumpsit at $10,000.

PADDOCK & IDE,
Pl'ff's Att'ys.

To the clerk of said court.
CHICAGO, *Aug.* 26, 1872.

(Endorsed:) Filed Aug. 26, 1872.

W'M H. BRADLEY, *Cl'k.*

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court.—October term, A. D. 1872.

GEORGE O. MARCY
vs. } In assumpsit.
THE TOWN OF OHIO.

We enter ourselves security for costs in this cause, and promise to

pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against pl'ff.

Dated this 26th day of August, A. D. 1872.

PADDOCK & IDE.

(Endorsed:) Filed Aug. 26, A. D. 1872. W'm H. Bradley, clerk.

On the same day, to wit, the twenty-sixth day of August, A. D. 1872, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the re-
4 turn of the marshal thereon, is the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon The Town of Ohio, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto George O. Marcy of a plea of trespass on the case upon promises to his damage, as it is alleged, of ten thousand dollars; and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 26th day of August, in the year of our Lord one thousand eight hun-
5 dred and seventy-two, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, M. U. Trimble my true and lawful deputy, to execute the annexed writ, (George O. Marcy vs. The Town of Ohio,) and to make true return thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have, this 13th day of September, A. D. 1872, executed the annexed writ, by delivering a true copy thereof to George Hammer, supervisor of said town of Ohio, therein named.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.
By M. U. TRIMBLE,
Special Deputy.

M. U. Trimble, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this 13th day of September, A. D. 1872.

[SEAL.] J. W. TEMPLETON,
County Clerk of Bureau Co., Ill.

6 (Endorsed:) Filed Sept. 14th, A. D. 1872. W'm H. Bradley, clerk.

On this day, to wit, the 20th day of September, A. D. 1872, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause. Which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
and State of Illinois, ss:

In the circuit court thereof, northern district.

GEORGE O. MARCY }
vs.
THE TOWN OF OHIO. }

George O. Marcy, who is a citizen of the State of Massachusetts, the plaintiff in the above-entitled cause, complains of The Town of Ohio, citizens of said State of Illinois, and a municipal corporation organized and existing under and by virtue of the township organization laws of the said State of Illinois, and known and called by said name of
7 The Town of Ohio, and having their principal place of business, in the county of Bureau, and State of Illinois, defendants in said suit in a plea of assumpsit. For that whereas heretofore, to wit, on the first day of January, A. D. one thousand eight hundred and seventy-one, at said county of Bureau, and district aforesaid, the said town of Ohio, by the name of the township of Ohio, in the county of Bureau, and State of Illinois, issued and delivered to the Illinois Grand Trunk Railway, a railroad corporation created and existing under and by virtue of the laws of said State of Illinois, their written evidences of indebtedness, commonly called railroad bonds, subscribed by William S. Wilson, the supervisor, and John W. Forney, the town clerk of said town, to the number of four hundred, (400,) and thereby, then and there, in and by each of said evidences of indebtedness or bonds, acknowledged themselves to be indebted to the said Illinois Grand Trunk Railway or bearer in the sum of one hundred (100) dollars, which sum said defendants, as such town, therein and thereby promised to pay to said railway or
8 to the bearer of such bond, on the first day of January, in the year in each of said bonds respectively mentioned, at the office of the State treasurer, in Springfield, Illinois, on the presentation of said bond, with interest thereon from the first day of January, A. D. one thousand eight hundred and seventy-one, at the rate of ten (10) per cent. per annum, payable annually, at the office of the State treasurer, in Springfield, Illinois, on the first day of January, in each year, until the maturity of said bonds as aforesaid, on the presentation and surrender of the coupons to said bond annexed as they severally became due, in each of which bonds it was recited that such bond was so issued under

and by virtue of the charter of said the Illinois Grand Trunk Railway, and amendment thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township, at the special election held on the twenty-first day of August, A. D. one thousand eight hundred and sixty-nine, (1869,) in accordance with said charter and amendment and laws, and to each of which said bonds was annexed,
9 at the said time of said delivery, a certain written order signed by said supervisor and town clerk, commonly called a coupon or interest-warrant, directing the supervisor of said township to pay to the bearer thereof, on the first day of January, A. D. one thousand eight hundred and seventy-two, (1872,) the sum of ten dollars at the office of the State treasurer, at Springfield, Illinois, the said sum of ten dollars being the sum of annual interest due on each of said bonds for the year ending January first, A. D. one thousand eight hundred and seventy-two; and whereas, also, after the delivery of said bonds with said coupons annexed, to said railway as aforesaid, to wit, on said first day of January, A. D. one thousand eight hundred and seventy-one, at the county of Suffolk, to wit, at said State of Massachusetts, said the Illinois Grand Trunk Railway sold, passed, and assigned said bonds and coupons for value, and to bona-fide purchasers, by means whereof the said four hundred orders or coupons so falling due as aforesaid on said first day of January, A. D. one thousand eight hundred and seventy-
10 two, then and there became and were detached from said bonds, and came into the hands of said plaintiff as the owner and bearer holder thereof in good faith, and for value, prior to said last-named day. And whereas one of said four hundred written orders or interest-warrants so as aforesaid detached, was and is in the words and figures following, to wit:

$10.] OHIO TOWNSHIP RAILROAD-BOND. [No.

Interest-warrant.

Supervisor of the township of Ohio pay to bearer, January 1st, 1872, ten dollars at the office of the State treasurer, Springfield, Illinois.

(Signed) W'M S. WILSON,
Supervisor.
J. W. FORNEY,
Town Clerk.

And whereas each of the other three hundred ninety-nine (399) of said orders or warrants last named, saving that it bore a serial number corresponding to the number of the bond, from which it was detached as aforesaid, was of the same tenor and effect with the one of said orders or warrants above set forth, the said defendants, in consideration
11 of the premises, then and there undertook and promised to pay the said plaintiff as the lawful bearer of said last-named four hundred orders or interest-warrants each and all said several sums of money in said orders mentioned at the time and place in the same mentioned, and according to the true intent and meaning thereof, yet neither said supervisor nor said defendants nor any person on behalf of said defendants has ever paid said sums or any part thereof, though said time has long since elapsed, though defendant has been often thereto requested, and though each of said orders or warrants was duly presented for payment at the office of the State treasurer therein mentioned, at Springfield, Illinois, aforesaid, on the day, to wit, when the same became due, of all which said defendants then and there had notice.

12 And plaintiff avers that, neither at the time when said coupons were drawn, nor at any time afterwards, and before the said coupons became due, nor at the time when said coupons became due, had the said town, or the supervisor thereof, or any other person on behalf of said town, either in said town, or at the said State treasurer's office, in Springfield aforesaid, or at any other place, any funds or effects of said defendant for the purpose of paying said coupons, or any of them, or interest on said bonds; nor has said town at any time made any appropriation or provision for the purpose of paying said coupons or any of them, the said interest, nor any part thereof, nor had said supervisor received any consideration for the acceptance or payment of said coupons, nor has said def't sustained any damage by reason of it, or said supervisor and town clerk, not having had notice of the non-payment of said coupons.

13 And for that whereas, also, the said defendants heretofore, to wit, on said first day of January, A. D. 1871, at the county of Bureau, and district aforesaid, by the said name of the township of Ohio, in the county of Bureau, and State of Illinois, issued and delivered to said The Illinois Grand Trunk Railway their certain other evidences of indebtedness commonly called railroad bonds, subscribed by said supervisor and clerk to the number of four hundred, and thereby, in and by each of said evidences of indebtedness or bonds, acknowledged themselves to be indebted to said railway or bearer in the sum of one hundred dollars, which sum said defendants, as such town, therein and thereby promised to pay to said railway, or to the bearer of such bond, on the first day of January, in the year in each of said bonds respectively mentioned, at the office of the State treasurer, in Springfield, Illinois, on the presentation of said bond, with interest thereon from the first day of January, A. D. 1871, at the rate of ten per cent. per annum, payable annually at the office of the State treasurer, in Spring-

14 field, Illinois, on the first day of January in each year until the maturity thereof as aforesaid, on the presentation and surrender of the coupons to said bond annexed as they severally became due, in each of which evidences of indebtedness or bonds were the several recitals contained in the bonds in the foregoing count mentioned, and to each of which bonds in this count first mentioned was annexed at the time of said delivery a certain written order, signed by said supervisor and town clerk, commonly called a coupon, or interest-warrant, of the like tenor and effect of the certain orders or interest-warrants in said foregoing count mentioned.

And whereas, also, after the issue and delivery of the bonds last named with the said orders or coupons annexed thereto as aforesaid, to wit, on said first day of January, A. D. 1871, at said county of Suffolk, to wit, at said State of Massachusetts, said The Illinois Grand Trunk Railway sold, passed, and assigned all said last-named bonds and coupons, for value, to bona-fide purchasers, by means whereof the said four hundred (400) last-named orders or coupons, so falling due as aforesaid on

15 said first day of January, A. D. 1872, became and were detached from said bonds last named, and came into the hands of said plaintiff as the owner and bearer thereof in good faith and for value, to wit, long prior to said last-named day, the said defendants, in consideration of the premises, then and there undertook and promised to pay the said plaintiff, as the lawful bearer of said last-named four hundred (400) orders or interest-warrants, all said several sums of money in said orders mentioned, according to the tenor and effect thereof, to wit, at the time and place aforesaid, which time has long since elapsed, and,

though often thereto requested, said defendants have not, nor has any person paid said sums so promised, or any part thereof, but to pay the same have refused, and still do neglect and refuse, though each of said last-named orders was duly presented at the office of said treasurer, at said Springfield, to wit, at the day it became due; and plaintiff avers
that neither at the time when said last-named orders or coupons
16 were drawn as aforesaid, nor at any other time, from that time to
the time of such presentation of said last-named orders, had said supervisor, or his successor in office, any money of said defendants applicable to the payment of said orders, or any of them, nor have defendant sustained any damage by reason of any lack of notice of the non-payment of said orders, or any of them, as aforesaid; & the pl'ff further avers that the coupons sued on in each of the foregoing counts are the coupons mentioned in the inducement to such count as having been annexed to the bonds in said count mentioned, and that since said railway has sold and disposed of said bonds as aforesaid, said bonds have passed from hand to hand in the stock-market like other negotiable securities, and that plaintiff cannot produce said bonds to the court; and plaintiff further avers that he is the owner of the interest accrued on said bonds as evidenced by the aforesaid coupons counted; and he hereby brings said coupons into court, and offers to have the same cancelled upon the entry of judgment thereon in this cause.

17 For that whereas also the said defendants heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, at Chicago, to wit, at said district, became and were indebted to the said plaintiff in the sum of ten thousand dollars of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of the said defendants;

And in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the request of the said defendants; and in the like sum for other money by the said defendants before that time had and received, to and for the use of said plaintiff; and in the like sum of $10,000 for other money before that time, and then due and owing the said plaintiff, for interest upon and for the forbearance of divers other sums of money, before that time and then due and owing from said defendants to said plaintiff, & in like sum for interest on said coupons after maturity as aforesaid;
and being so indebted, the said defendants, in consideration
18 thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested; and whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid accounted, together with the said plaintiff, of and concerning divers other sums of money, before that time due and owing from the said defendants to said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand (10,000) dollars of the like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, and the said defendants in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then
and there faithfully promised the said plaintiff, well and truly to
19 pay unto the said plaintiff the said sum of money last mentioned,

when the said defendant should be thereunto afterwards requested; nevertheless, said defendant' (although often requested, etc.) have not yet paid the several sums of money above mentioned, or any, or either of them, or any part thereof to the said plaintiff; but to pay the same, or any part thereof, to the said plaintiff the said defendant has hitherto refused, and still do refuse, to the damage of the said plaintiff ten thousand dollars; and therefore the said plaintiff brings suit, etc.

PADDOCK AND IDE,
Plaintiff's Attorneys.

Copy of the instruments & acc'ts sued upon.

One of the 400 interest coupons sued on in this action is set out in the first count; the other 399 are like it in date amount, and tenor, and said coupons are numbered 1 to 400 inclusive.

Said def'ts to pl'ff, Dr.

To money lent and advanced	$10,000
To money paid, laid out, and expended	$10,000
To money had and received to and for the use of said plaintiff	$10,000
To balance due on account stated	$10,000
To interest on said 400 coupons from their maturity to date hereof	10,000
To exchange	100

20 PADDOCK & IDE.

(Endorsed:) Filed this 20th day of Sept., A. D. 1872. W'm H. Bradley, clerk.

On this day, to wit, the seventh day of October, A. D. 1872, came said defendant, by its attorneys, filed in said clerk's office its plea and affidavit in said-entitled cause, which said plea and affidavit are in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court, Oct. term, 1872.

GEORGE O. MARCY
vs.
THE TOWN OF OHIO. } Assumpsit.

And the said defendant comes and defends the wrong and injury when, etc., and says that it, the said town of Ohio did not undertake and promise in manner and form as the said plaintiff hath in his said declaration complained against said town, and of this the said town puts itself upon the country.

MILTON T. PETERS,
J. J. HERON,
Def'ts Att'ys.

21 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

George Hammer, supervisor of the town of Ohio, being duly sworn, says that the above plea, pleaded by the town of Ohio, is true in sub-

stance and fact, and that the said town did not execute the bonds and coupons in said plaintiff's declaration described, or any or either of them, and the same are not the bonds or coupons of said town; that if the same purport to be executed by the persons described in plaintiff's declaration, the same were executed without the authority of said town, and to defraud said town, and that the Illinois Grand Trunk Railway was a party to such a fraud. This affiant further says that the said town is not indebted to the said plaintiff as alleged in the common counts of plaintiff's declaration, nor is said town indebted to said plaintiff in any way or to any amount whatever.

This affiant says that he is the present supervisor of said town, and is defending said suit for and in behalf of said town and by its
22 authority, and that this affidavit is made for said town.

GEORGE HAMMER,
Supervisor.

Sworn to and subscribed before me this 5th day of October, 1872.

E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed Oct. 7, 1872. W'm H. Bradley, cl'k.

On the same day, to wit, the 7th day of October, A. D. 1872, the stipulation of the parties, by their attorneys, was filed in said clerk's office in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court, October term, 1872.

GEORGE O. MARCY } Assumpsit.
vs.
THE TOWN OF OHIO. }

It is hereby stipulated that the defences of the defendant shall
23 be admitted under the general issue the same as though specially pleaded, reserving, however, all objections to the legal admissibility of the testimony that may be offered on the trial of the cause.

October 5th, 1872.

PADDOCK & IDE, *for Pl'ff.*
PETERS & HERRON, *Def'ts' Att'ys.*

(Endorsed:) Filed Oct. 7, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the seventh day of March, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Jury waived, &c.

GEORGE O. MARCY } Assumpsit.
vs.
THE TOWN OF OHIO. }

Now come the parties, by their attorneys, and upon issue joined by

agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and after hearing a part of the evidence, the hour of adjournment having ar-
24 rived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 8th day of March, in said March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Cause taken under advisement.

GEORGE O. MARCY
vs. } Assumpsit.
THE TOWN OF OHIO.

Now come again the parties, by their attorneys, and after hearing the concluding evidence and the arguments of counsel, the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 12th day of March, in said March term A. D. 1873, of said court, in the record of the proceedings thereof, before the Hon. Thomas Drummond, judge, appears the following entry in said entitled cause, to wit:

Finding & judgment.

GEORGE O. MARCY
vs. } Assumpsit.
THE TOWN OF OHIO.

25 The court having considered, and being now fully advised upon the matters heretofore submitted, herein finds the issue for the plaintiff, and assesses his damages to the sum of forty-two hundred and eighty-six dollars and sixty cents.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of forty-two hundred and eighty-six dollars and sixty cents, his damages, together with his costs in this behalf expended, amounting to the sum of two hundred twel y-eight dollars and seventy cents.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

26 *Bill of exceptions.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1873.

GEORGE O. MARCY
vs. } Assumpsit.
THE TOWN OF OHIO.

Be it remembered that, upon the trial of the above cause before the

honorable Thomas Drummond, judge of said circuit court, without a jury, the parties to said suit having previously filed with the clerk of said court their written stipulation, waiving a jury in said cause, the plaintiff, to maintain the issue on his part, offered and read in evidence the following documentary and oral testimony, to wit:

1st. An act of the legislature of the State of Illinois, incorporating the Illinois Grand Trunk Railway, entitled "An act to incorporate the Illinois Grand Trunk Railway," in force February 28, 1867, and particularly sections one, two, six, ten, and eleven of said act, as follows:

In force Feb'y 28, 1867.

SECTION 1. *Be it enacted by the people of the State of Illinois represented in the general assembly*, That William P. Pierce, Henry Sherrill, Charles H. Gilman, Jacob Albright, and A. J. Matteson, and their associates, successors, and assigns, be, and they are hereby, created a body corporate, by the name and style of the "Illinois Grand Trunk Railway," with perpetual succession and power to build, maintain, and use a railroad from some point or points on the Mississippi River, either at Rock Island, Fulton, or any intermediate point or points, to Prophetstown, Mendota, Newark, the village of Lisbon, Grentown, and Joliet to Chicago, or to any desirable point on the Indiana State line; the said railroad to be built on or near the established line of the old Illinois Grand Trunk Railway, as nearly as may be practicable, from Prophetstown to Joliet, running through the places before named, between Prophetstown and Joliet; to purchase, hold, lease, sell, and convey estate, whether real, personal, or mixed, so far as may be necessary to carry out the intentions of this act; and in their corporate name may sue and be sued as natural persons; to have and use a common seal; to make all by-laws, rules, and regulations deemed necessary and proper for the government and management of said corporation and its affairs; and shall have the right to exercise all powers which are or may be necessary to carry into effect the purposes and objects of this act. And also for such purposes may make, execute, and deliver bonds, notes, mortgages, or other evidences of indebtedness and agreements to pay the same, and for such purposes may negotiate for and take the same.

Powers & privileges.

SECTION 2. Said corporation shall have the right to negotiate for and purchase the road-bed and right of way of the late or old "Illinois Grand Trunk Railway," from Albany, in Whiteside County, to Joliet, in Will County, and each and all of the corporate rights, franchises, and privileges of said old Illinois Grand Trunk Railway Company, and to go on and build and complete the same when so purchased to all intents and purposes the same as said Illinois Grand Trunk Railway might have done had the organization thereof been kept up; but nothing in this act shall be construed to make the corporation hereby formed liable in any way or manner to pay the debts of said old Illinois Grand Trunk Railway Company, and all rights, privileges, franchises, and property which have lapsed and reverted to the State of Illinois from the failure of the old Illinois Grand Trunk Railway, are hereby granted and vested in the corporation created by this act.

SECTION 6. The persons named in the first section of this act are hereby appointed the directors of said corporation, and shall hold their office for one year from the first day of June, A. D. 1867, or until others are elected; and said persons heretofore named in section one of this act are also appointed commissioners, who, or a majority of

whom, are hereby authorized to open stock subscription-books for the capital stock at such time or times, and place or places, as they may deem proper; said commissioners shall require each subscriber to pay five dollars on each share of capital stock subscribed at the time of subscribing.

The directors appointed by this act, or a majority of them, shall constitute a quorum for the transaction of business, and shall elect one of their number to be president of said company. They shall also elect a secretary and treasurer, and such officers and agents as they shall deem proper.

In case a vacancy occurs in the board of directors, it may be filled by the remaining directors, or as the by-laws of said corporation may prescribe. No person shall hereafter be elected a director in said company, unless he shall be a stockholder thereof.

SECTION 10. For the purpose of facilitating the construction of
30 the railroad authorized by this act, said corporation is empowered to borrow money and pledge its property, both real and personal, and its rights, credits, and franchises to secure the payment thereof.

SECTION 11. This act shall be deemed to be a public act, and shall take effect from and after its passage.

Approved February 28, 1867.

2d. An act of said legislature amendatory of said last-named act of Feb. 28, 1867, in force March 25, 1869, as follows:

An act to amend an act entitled "An act to incorporate the Illinois Grand Trunk Railway."

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the general assembly,* That any city, incorporated
In force March 25, 1869. town, or township which may be situated on or near the route of the Illinois Grand Trunk Railway west of the city of Mendota, via Prophetstown, to the Mississippi River, may become subscribers to the stock of said railway, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached,
31 under such limitations and restrictions and on such conditions as they may choose and the directors of said company may approve, the proposition for said subscription having been first submitted to the inhabitants of such city, town, or township and approved by them; and upon application of any ten voters of any city, town, or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscriptions, it shall be the duty of the clerk of such city, town, or township immediately to call an election in the same manner that other elections for said city, town, or township are called, for the purpose of determining whether said city, town, or township will subscribe to the stock of said railway; and if a majority of said votes shall be for subscription, then the corporate authorities of said city, town, or township, and the supervisor and town clerk of said township so voting, shall cause said subscription to be made, and upon its acceptance by the directors of said company, shall cause bonds to be issued in conformity with said vote; which bonds shall not be of less denomination than one hundred dollars, and in no case bear a higher
32 rate of interest than ten per cent.: Providing, No such election shall be held until at least thirty days' previous notice thereof shall be given in the manner prescribed by law.

SECTION 2. It shall be the duty of the proper authorities of any city,

town, or township, issuing bonds as aforesaid, to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon; and to levy such taxes as may be necessary therefor, as other taxes are levied by them.

SECTION 3. This act shall be liberally construed for the purposes intended and expressed therein, and shall be held to be a public act, and shall be in force from and after its passage.

Approved March 25, 1869.

3d. A bond with coupons attached, signed by the supervisor and town clerk of said town, and also the four hundred coupons sued on in this action, all being of the same date, payable at the same time, signed by said supervisor and town clerk, and in all respects alike except as to the number of the bonds to which the same were originally attached, and it was proved that the persons signing said coupons and bonds were,
33 at the time of signing, issuing, and delivering the same, the supervisor and town clerk of said town, and that their signatures to said coupons and bonds were genuine; and it was further proved that said coupons, sued on, were attached originally, each to one of a series of four hundred bonds signed by said supervisor and clerk, in all respects alike, (the said bond introduced in evidence being one of said series,) except as to the number of the bonds in the margin, and the times when said bonds fell due; and that said bonds fell due one-fifth of the whole number five years after the date thereof, another fifth in six years, another in seven years, another in eight, and the remaining fifth in nine years from the date thereof. The said bond and one of said coupons introduced in evidence are as follows:

Number 9.] [Dollars 100.

UNITED STATES OF AMERICA,
State of Illinois:

OHIO TOWNSHIP RAILROAD-BOND.

Know all men by these presents that the township of Ohio, in the county of Bureau, and State of Illinois, is indebted to the Illinois
34 Grand Trunk Railway, or bearer, in the sum of one hundred dollars lawful money of the United States, which the said township of Ohio promises to pay to the said Illinois Grand Trunk Railway, or to the bearer hereof, on the first day of January, in the year one thousand eight hundred and seventy-six, at the office of the State treasurer in Springfield, Illinois, on the presentation of this bond, with interest, from the first day of January, A. D. 1871, at the rate of ten per cent. per annum, payable annually, at the office of the State treasurer, in Springfield, Illinois, on the first day of January, in each year, on the presentation and surrender of the annexed coupons, as they sev'rally become due.

This bond is issued under and by virtue of the charter of said Illinois Grand Trunk Railway and amendment thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township, at the special election held August 21, A. D. 1869, in accordance with said charter and amendment and laws.

In witness whereof the said township of Ohio has caused these presents to be signed by the supervisor and clerk of said township of

35 Ohio, this first day of January, one thousand eight hundred and seventy-one.

WILLIAM S. WILSON, *Supervisor.*
JOHN W. FORNEY, *Town Clerk.*

$10.] OHIO TOWNSHIP. [No. 9.

RAILROAD BOND.

I

INTEREST WARRANT.

Supervisor of the township of Ohio, pay to bearer, January 1st, 1872, ten dollars, at the office of the State treasurer, Springfield, Illinois.

W'M S. WILSON, *Supervisor.*

J. W. FORNEY, *Town Clerk.*

Endorsed on the back of said bond, as follows:

"THE ILLINOIS GRAND TRUNK RAILWAY,
By A. H. CASTLE, *President.*

AUDITOR'S OFFICE, ILLINOIS,
Springfield, April 15th, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

36 In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[L. S.] C. E. LIPPINCOTT,
Auditor P. A.

4th. The deposition of said plaintiff by which it was proved that the plaintiff purchased and became the owner of the said four hundred bonds and the said coupons in suit, in open market, for cash paid by him at the rate of ninety-one cents on the dollar, in October, 1871, and before the maturity of any of said papers, and without any knowledge or notice of any defense or defect of any kind to or in said securities, and that each of said bonds was indorsed in blank by said Illinois Grand Trunk Railway; that the coupons sued upon were cut by the plaintiff from said bonds, and were presented by the plaintiff, and payment thereof demanded at the office of the State treasurer in Springfield, Illinois, where the same were payable by the terms of said bonds, prior to the commencement of this suit, and after said coupons matured, and that such payment was then refused for the want of funds; and it was further proved that said defendant had not raised or appropriated

37 any moneys or taxes for the purpose of paying said coupons, and had no funds at any time, nor at any place, for such purpose.

5th. The plaintiff also proved that the defendant was a township in Bureau County, State of Illinois, and a municipal corporation under the general township organization laws of the State of Illinois, and had been such since the year 1850, and that it transacted and transacts its

business under and uses the corporate name of the town or township of Ohio, either one, and that its territorial limits were and are the same as congressional township 18 north, range 9 east of the 4th principal meridian, and that the route of said Illinois Grand Trunk Railway from Mendota, in La Salle County, Illinois, via Prophetstown, in Whiteside County, to the Mississippi River, since the passage of said act of Feb. 28, 1867, runs directly through said town of Ohio, the said town being situated about fifteen miles west of said Mendota.

6th. The plaintiff read in evidence from the records of said town the proceedings relating to an election held in said town on the 21st day of August, 1869, under the authority of said act of March 25, 1869, for the purpose of subscribing to the capital stock of said Illinois Grand Trunk Railway, as follows:

1st. Application for the holding of such election.

38 2d. One of the notices given by the town clerk calling said election.

3d. A register of the voters of said town, prepared prior to and for said election.

4th. One of the poll-books used at said election, containing the names of the voters thereat, and the certificates or returns of the judges and clerks of said election, by which it was proved that 125 votes were cast at said election in favor of subscription and 13 votes against subscription.

5th. The record of the result of said election, entered by the town clerk of said town in the town records.

The undersigned, legal voters of the town of Ohio, county of Bureau, State of Illinois, hereby make application for the calling of an election in said town, in accordance with an act of the legislature of the State of Illinois, approved March 25th, 1869, providing for subscription to the capital stock of the Illinois Grand Trunk Railway Company, and your petitioners hereby ask that due notice shall be given according to law, submitting the following proposition to the legal voters of said town, to wit: To subscribe four hundred shares, of one hundred dollars

39 each, to the capital stock of said company, and to issue bonds of said town therefor to the number of four hundred, of one hundred dollars each, and bearing interest at the rate of ten per cent. per annum; said bonds to be due and payable to wit: one-fifth of the number of said bonds shall be due and payable five years after date, and one-fifth of the whole number shall be due in each and every succeeding year thereafter, according to their numerical order, until they are all paid and cancelled; said bonds to be issued and delivered only on this expressed condition, that the aforesaid Grand Trunk Railway shall be completed, and the cars running thereon for the purpose of carrying passengers and freight from Mendota, through the town of Ohio, on the old grade; and it is hereby further conditioned that the depot shall be located on the old site selected by the old Illinois Grand Trunk Railway Company.

STERLING POMEROY.	JACOB ALBRIGHT.
JACOB JOSLER.	WILLIAM S. WILSON.
JOSEPH G. WILSON.	ALBERT SHIFFLET.
ANDREW ROSS.	J. S. KASBEER.
L. E. REMSBURG.	P. F. REMSBERG.
J. H. BOWLERS.	D. P. SMITH.
GEORGE HAMMER.	A. R. SCOTT.
S. REMSBERG.	W. B. ROSS.
JACOB ROSS.	

40 (Endorsed on the back as follows:) "Filed in the clerk's office of the town of Ohio, Bureau County, Illinois, this 14th day of July, A. D. 1869. John W. Forney, town clerk."

NOTICE.

That by virtue of the act approved March 25, 1869, this is to give notice that, on the 21st day of August, A. D. 1869, an election will be held at the town-hall, in the township of Ohio, Bureau County, and State of Illinois, for the qualified voters of said township to vote for or against the proposition of subscribing to the capital stock of the Illinois Grand Trunk Railway, as provided in the act approved March 25, 1869. It is hereby proposed to subscribe four hundred shares, of one hundred dollars each, to the stock of said railway, and to issue bonds therefor of the denomination of one hundred dollars each, and drawing interest at the rate of ten per cent. per annum; said bonds to be due and payable to wit: one-fifth of the number of said bonds shall be due and payable five years after date, and one-fifth of the whole number shall be due in each and every succeeding year thereafter, according to their nu-
41 merical order, until they are all paid and cancelled; said bonds to be issued and delivered only on this expressed condition, that the aforesaid Grand Trunk Railway shall be completed, and the cars running thereon for the purpose of carrying passengers and freight from Mendota, through the town of Ohio, on the old grade; and it is hereby further conditioned that the depot shall be located on the old site selected by the old Illinois Grand Trunk Railway Company. The polls to be opened at 9 o'clock a. m. and closed at 6 p. m.

J. W. FORNEY, *Town Clerk.*

Poll-book.

Poll-book of an election held at the town-hall, in Ohio Town, in the county of Bureau, and State of Illinois, on the 21st day of August, A. D. 1869, for the purpose of voting for or against subscribing to the capital stock of the Illinois Grand Trunk Railway to the amount of four hundred shares, of one hundred dollars each.

STATE OF ILLINOIS, *Bureau County, ss:*

We, J. H. Bolus, Elliot Cole, and Sterling Pomeroy, do solemnly swear that we will perform the duties of judges of this election accord-
42 ing to law and the best of our abilities; that we will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same.

STERLING POMEROY,
ELLIOT COLE,
J. H. BOLUS, *Judges.*

STATE OF ILLINOIS, *Bureau County, ss:*

We, John W. Forney and Frank Langworthy, do solemnly swear that we will perform the duties of clerk' of this election according to law and the best of our abilities; that we will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same.

FRANK LANGWORTHY,
JOHN W. FORNEY, *Clerks.*

Subscribed and sworn to before me this 21st day of August, A. D. 1869.

C. D. TRIMBLE,
Clerk Co. Ct.

No. 1.] Names of voters.

S. Pomeroy, and the names of 137 other voters, at said election, in all 138, here followed in said poll-book.

Tally-list of an election held at the town-hall, in Ohio Town, in the
43 county of Bureau, and State of Illinois, on the 21st day of August, A. D. 1869, for the purpose of voting for or against subscribing to the capital stock of the Illinois Grand Trunk Railway, to the amount of four hundred shares of one hundred dollars each.

For subscription 𝍸 𝍸 𝍸

twenty-five votes were cast for said subscription and thirteen votes were cast againt said subscription.

On motion, adjourned without day.

Attest:

J. W. FORNEY, *Town Clerk.*

7th. The plaintiff then proved that said application was signed by seventeen legal voters of said town; was presented to and filed by the town clerk of said town, in his office, on the 14th day of July, 1869; that said town clerk called said election of August 21st, 1869, pursuant to said application, in the manner prescribed by said act of March 25, 1869, and gave notices thereof for the requisite period of time prior thereto and in the way required by the law; and that said election was held at the time and place appointed in said notices; and that the judges who presided at said election were the supervisor, assessor, and collector of said town, and were duly sworn to act as such judges at the opening of the polls; and further, that said number of one hundred and twenty-five votes cast at said election in favor of subscription constituted a majority of all the voters then of said town.

46 8th. The plaintiff then proved that the said four hundred bonds and coupons attached, including the coupons in suit, were signed by the supervisor and town clerk of said town in October, 1870, in pursuance of the subscription of Aug. 21, 1869, and were by said supervisor and town clerk handed over to said supervisor and one Pomeroy, a citizen of said town; and that in the latter part of October, 1870, said bonds and coupons were delivered by them to one John Warfield, of Quincy, Illinois, an owner of lands in said town, and formerly a citizen of said town, for safe-keeping, with verbal instructions from them to deliver said bonds and coupons to the Illinois Grand Trunk Railway on the completion of the railroad to said town; and said Warfield also gave a receipt for said securities, as follows: "Ohio, Oct. 26, 1870. Received of the supervisor and town clerk of said town four hundred township bonds, in trust, to be delivered to the Illinois Grand Trunk Railway upon the completion of said railway in accordance with the conditions of the vote of said town, at an election held on the 21st day of August, A. D. 1869." And that afterwards, on the 6th day of January, 1871, said Warfield, after having first received a written notification from the supervisor of said town to the effect that said railway was completed in accordance with the conditions of the vote of Aug. 21, 1869, delivered said bonds and coupons to said railway.

47 9th. The plaintiff then proved by the depositions of L. C. Ellsworth, J. H. Boulus, and Sterling Pomeroy that said railroad was completed and the cars running thereon for the purpose of carrying passengers and freight from Mendota through said town on the old grade as far as the station or depot in said town, on or before the fifth day of January, 1871; clear through said town on the 11th day of January, 1871, and soon after, via Prophetstown, in Whiteside County, Illinois, to the Mississippi River. That prior to January 5th, 1871, the depot referred to in the conditions of the vote was located as required by said conditions; that the "old grade" mentioned in said conditions was an old grade thrown up and constructed by a former railroad in places between said Mendota and said town of Ohio; that at the time of said vote of Aug. 21, 1869, and afterwards, it was the general understanding of the people of said town that the completion of the railroad referred to in said conditions was from Mendota through said town, and

that such was the construction given to the same by both the agents of said town and the officers of said railway. And further, that said railroad has ever since the delivery of said bonds been in operation as such; further, that said bonds, soon after their delivery to said company,
48 were endorsed by said railway in blank, and, with the coupons attached, sold to innocent purchasers for the purpose of paying the indebtedness incurred in constructing said railway, and from such purchasers passed by sale in the market to the plaintiff.

10th. The plaintiff then proved that at the time of the delivery of said bonds and coupons to said railway, the said Illinois Grand Trunk Railway executed and delivered to the said town a certificate of stock in said railway in the sum of $40,000, and being 400 shares of $100 each, in the capital stock of said railway, and accredited said town of Ohio as one of its stockholders to that amount on its books; that said certificate was received by the supervisor of said town, and filed among the town records, and that said town has never returned, nor offered to return, said certificate, but still retains the same.

The defendant, to maintain the issues on its part, then read in evidence:

1st. The files and record concerning the election of August 21, 1869, set forth above in the plaintiff's testimony.

49 2d. The defendant proved by the deposition of the secretary of said Illinois Grand Trunk Railway that said railway did not formally accept and record its acceptance of said subscription of Aug. 21, 1869, until in the month of October, 1870.

3rd. The defendant proved by verbal testimony that in April, 1870, sundry citizens of said town, among whom was the supervisor and other persons, met the president, secretary, and one of the directors of said railway, an' held an informal conference or discussion concerning the prospects of building said railroad, and the feasibility of entering into negotiations with another railroad for aid in such construction; that said president and secretary were also directors, the entire board of directors consisting of five members; that at said conference the said president or secretary expressed doubts as to the ability of said railway to build the road under the conditions of the vote of Aug. 21, 1869; that at said meeting some of the citizens present suggested that the president be requested to furnish a form for the calling a new election. But it was not proven that said directors were in session as a board of directors, nor that said railroad officers had, or claimed to have, any authority to bind said railway by their presence or statements at
50 said meeting. It was also proved that some weeks after said meeting, one of said citizens requested the secretary, but not in any official capacity, to furnish him a form for calling a new election, which said secretary did to accommodate such citizen.

4th. The defendant also proved that citizens of said town applied for an election to be held in said town on June 25, 1870, and that at an election held on that day, conducted by the supervisor, assessor, and collector as judges, the propositions contained in said application for said last election were rejected; but it was not proven that said election was held for the purpose of rescinding the vote of Aug. 21, 1869, nor was it proved who called, nor what notice was given of, said election of June 25, 1870. The application and the record and poll-book of said election of June 25, 1870, are as follows:

Petition.

To W'm Wilson, supervisor of the township of Ohio, in the county of Bureau, in the State of Illinois:

Your petitioners, the undersigned, legal voters of said township, represent that they are desirous of having the Illinois Grand Trunk
51 Railway construct their said road through said township, and in order that the same may be done, desire to have said township subscribe, take, and pay for forty thousand dollars of the capital stock of said company, and that such subscription may be made in accordance with the provisions of the charter of said company; and therefore do now here respectfully petition the said supervisor of said township to call an election of the legal voters of said township, to be held at the hall, in the said township of Ohio, on the 25th day of June, A. D. 1870, to decide, by ballot of the legal voters of said township, whether the said township of Ohio will subscribe for and take forty thousand dollars of the capital stock of said company, as authorized and provided for in the charter of the said Illinois Grand Trunk Railway, approved February 20, 1867, and amended March 25th, 1869; and that a notice of the time and place of holding such election may be given by the township clerk of said township for thirty days next previously to the time of holding such election, and that such notice may be given in the same manner, and such election be conducted in the same mode, and at the place provided for holding the general election in said township of Ohio; said vote to be taken upon the following conditions, to wit,
52 that said subscription shall be paid for in the bonds of said township coming due 5, 6, 7, 8, 9, 10 years from the date of their issue, and bearing interest at the rate of ten per cent. per annum, payable annually; that there shall be no call upon said township to issue said bonds, except five per cent. thereof, to be used for the purpose hereinafter set forth, until sufficient stock has been subscribed to grade, bridge, and tie that part of the road of said company lying between the town of Mendota, in La Salle County, Illinois, and the town of Prophetstown, in Whiteside County, Illinois, nor until a contract has been entered into with the Chicago, Burlington & Quincy Railroad Company or some other responsible capitalists to take or cause the first mortgage-bonds of the Illinois Grand Trunk Railway Company to be sold for an amount equal to twelve thousand dollars per mile in order to procure the necessary iron and materials to finish up said portion of said road; (it being understood that the five per cent. hereinbefore mentioned is to be used for the purchase of that portion of the road-bed of the old Illinois Grand Trunk Railway lying between said town of Mendota and the town of Albany, in Whiteside County, Illinois;)
53 nor until said road shall have been located through said township with the depot located within town of Ohio; said bonds to be called for pro rata with other township subscriptions as the requirement of the work demands; said vote to be taken upon the condition that said subscription shall not be binding upon said township for a longer period than three years, unless the above conditions shall have been fulfilled upon the part of said company.

Dated this 21st day of May, 1870.

M. R. DEWEY AND TWENTY OTHERS.

Minutes of special town meeting held at the hall, in Ohio Town, in the county of Bureau, & State of Illinois, on the 25th day of June, 1870

for the purpose of voting for or against subscribing forty thousand dollars to the capital stock of the Illinois Grand Trunk Railway:

At nine o'clock a. m. the meeting was called to order by J. W. Forney, town clerk.

W. S. Wilson, supervisor, J. H. Bowlus, assessor, and A. Hanenstein, collector of said town, were duly sworn (except Mr. Bolus, who was sworn by J. W. Forney, town clerk) by J. H. Bowlus, justice of the peace in said town.

M. J. Keith and J. W. Forney were duly sworn as clerks of election by J. H. Boulus, J. P.

54 The polls were then opened, proclamations thereof having first been made by J. W. Forney, clerk.

At 6 o'clock p. m. the polls were closed, and, upon canvassing the votes, it was found that fifty-eight votes were cast for subscription and sixty-eight votes were cast against subscription.

The meeting adjourned without day.

Attest:

J. W. FORNEY,
Town Clerk.

Poll-book of an election held at the town-hall, in Ohio Town, county of Bureau, and State of Illinois, on Saturday, the 25th day of June, A. D. 1870, for the purpose of voting for or against subscribing forty thousand dollars to the capital stock of the Illinois Grand Trunk Railway Co.

Names of voters.

ISAAC PARSONS and 125 others.

Tally-list of an election held at the town-hall on the 25th day of June, A. D. 1870.

On counting the votes the result was found to be as follows:

For subscription: 𝍸 𝍸 𝍸

6. The defendant proved that said Illinois Grand Trunk Railway has constructed no railroad over any of its route east of Mendota, in La Salle County, Illinois.

7th. The defendant also proved that the persons named as directors in said act of Feb. 28, 1867, met for the first time and organized as a board of directors by the election of officers, on January 20th, 1870.

56 8th. The defendant also read in evidence the 1st and 2d section of said act of Feb. 28th, 1867, and the whole of said act of March 25th, 1869, set forth above in plaintiff's testimony.

9th. The defendant then proved by the deposition of the town clerk, John W. Forney, that at the time he delivered said bonds and coupons to said Supervisor Wilson, he had an agreement or understanding with said supervisor and Pomeroy, that the bonds were not to be delivered to the company without his and Wilson's consent; that he had no personal knowledge what became of the bonds after he parted with them, and was not consulted afterwards with reference to their delivery.

10th. The defendant also proved that it had never voted or represented its stock in said railway in any way, and had not paid any part of said bonds or coupons, either principal or interest, and that an injunction, on the application of four citizens of said town, was sued out of the circuit court of Bureau County, Illinois, on January 13, 1871, to restrain the delivery of said bonds, which injunction on the filing of the answer, showing the previous delivery of the bonds, was dissolved,

57 and the bill dismissed.

The plaintiff then proved in rebuttal as follows:

1st. By the secretary and treasurer of said railway, that the persons named as corporators in the first section of said act of Feb. 28, 1867, and in the 6th section of said act, as the directors of said railway, accepted their said offices as directors, and acted as such from the passage of said act until the formal organization of the board of directors on January 20th, 1870; that said board of directors formally accepted said subscription of Aug. 21, 1869, at a regular meeting held in October, 1870, and never repudiated it nor refused it, nor accepted or offered to accept any other in its place; and that they caused their acceptance of said subscription to be entered of record at said October meeting; and further, that said railway never authorized any officer or other person to hold said election of June 25, 1870. That in July, 1870, said railway commenced preparations to build its said road, bought and acquired the old grade and road-bed of the old Illinois Grand Trunk Railway, commenced the work of construction of its road in October, 1870, and pushed it to completion in full reliance upon the subscription

58 of August 21, 1869; that said railway had nothing to do with said election of June 25, 1870; and that the same was entirely voluntary on the part of the citizens of said town; that said informal meeting held in April, 1870, was simply for conference and to discuss the policy of negotiations with some other railroad for aid in constructing said railway, and that the officers of said railway then present did not intimate that said railway would not accept or rely upon said vote of Aug. 21, 1869, and never claimed that a new election would have to be held.

2d. The plaintiff then proved by the testimony of J. W. Forney, town clerk, W. S. Wilson, supervisor, and Sterling Pomeroy, citizens of said town, who acted as judges and clerks at said election of June 25, 1870, that the same was voluntary on the part of the citizens of said town and not suggested by said railway; that said election was not held for

the purpose of repealing or rejecting the subscription of Aug. 21, 1869, and was not intended to affect the first election, but to offer said railway better terms and more favorable conditions, among which was the proposition to pay said railway five per cent. of the amount
59 voted at said first election, in advance of the company's performance of the conditions in order to enable the company to buy up the old grade of the old Illinois Grand Trunk Railway.

This was all the evidence given in the case, and the court thereupon found and doth hereby certify the above to be the facts, and the only facts, in the case.

The court thereupon, then and there, found the issues in favor of the plaintiff, and assessed the plaintiff damages in the sum of $4,286.60, to which the defendant then and there excepted. The defendant moved for a new trial, claiming that the finding was contrary to the law and the evidence. The court overruled the motion for a new trial, to which the defendant then and there excepted, and the court rendered final judgment for the plaintiff and against the defendant, to which the defendant then and there excepted.

And forasmuch as the above finding of facts are not a part of the record, the defendant prays the court to sign and seal this, his bill of exceptions, and make the same a part of the record, which is done accordingly.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed March 12, 1873. W'm H. Bradley, cl'k.

60 On this day, to wit, the 16th day of April, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its bond in said entitled cause, which said bond is in words and figures following, to wit:

Writ of error from the circuit court of the United States for the northern district of Illinois to the Supreme Court of the United States, ss:

Know all men by these presents that we, the town of Ohio, Bureau County, Illinois, and the undersigned, are held and firmly bound unto *to* George O. Marcy in the sum of five hundred dollars, to be paid to George O. Marcy, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 2d day of April, A. D. 1873.

61 Whereas the above-named town of Ohio hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois, wherein George O. Marcy was plaintiff and the town of Ohio defendant, which judgment was against the said defendant:

Now, therefore, the condition of this obligation is such that if the above-named town of Ohio shall prosecute its said writ of error to effect, and answer all costs if the said town shall fail to make good its plea,

then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

TOWN OF OHIO, BUREAU COUNTY, ILLINOIS. [SEAL.]
GEORGE HAMMER, [SEAL.]
(as Supervisor) Supervisor of said Town.
JAMES ROSS. [SEAL.]
NELSON SHIFFLET. [SEAL.]
JOHN GELCHERS. [SEAL.]
G. M. DODGE, [SEAL.]
As Clerk of said Town.

Sealed & delivered in presence of—
MILTON T. PETERS.

Approved:

62 THOMAS DRUMMOND.

(Endorsed:) Filed April 16, 1873.

W'M H. BRADLEY, *Clk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause therein, wherein George O. Marcy is plaintiff and The Town of Ohio is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in said district, this 26th day of August, A. D. 1873, and of our Independence the 98th.

[SEAL.] W'M H. BRADLEY, *Clerk.*

63 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between George O. Marcy, plaintiff, and The Town of Ohio, defendant, a manifest error hath happened, to the great damage of the said town of Ohio, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
64 with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twelfth day of March, A. D. 1873, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S., northern dist. of Ill's. George O. Marcy vs. The Town of Ohio. Writ of error.

65 UNITED STATES OF AMERICA, *ss:*

To GEORGE O. MARCY, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The Town of Ohio, Bureau County, Illinois, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon'l. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-three.

THOMAS DRUMMOND.

66 APRIL 16TH, 1873.

Received this day a copy of the within citation.

GEORGE O. IDE,
Attorney for Defendant in Error.

(Indorsed:) Supreme Court of the United States. The Town of Ohio vs. George O. Marcy. Citation on writ of error.

67 Supreme Court of the United States. October term, A. D. 1873.

THE TOWN OF OHIO, PL'FF IN ERROR,
vs.
GEORGE O. MARCY, D'FT IN ERROR. } Error to circuit court of U. S. for n. d. of Ill's.

Now comes the said plaintiff in error, and says in the record and proceedings aforesaid there is manifest error in this, to wit, that the circuit court erred—

1st. In rendering judgment for the plaintiff below on the facts found by the said court, to have been proved on the trial. That said facts so found are insufficient to support the judgment of said court.

2d. Upon the facts thus found, the finding of the court should have been for the defendant below, as the same showed that the said defendant had not assumed and promised, as in plaintiff's declaration alleged, and in fact owed said plaintiff nothing.

3d. The said court erred in allowing interest upon the 400 coupons declared upon, as in law such coupons did not bear interest, yet the court allowed in the judgment $286.60 therefor.

4th The court erred in overruling said defendant's motion for a new trial, and in rendering final judgment for the plaintiff.

Wherefore the plaintiff in error prays that said judgment may be reversed, etc.

MILTON T. PETERS &
J. B. HOWLEY,
Att'ys for Plaintiffs in Error.

(Indorsement on cover:) No. 480. The Town of Ohio, plaintiff in error, vs. George O. Marcy. N. Illinois C. C. U. S. Filed 23 September, 1873.

Supreme Court of the United States.

October Term, A.D. 1873.

THE TOWN OF OHIO,
Plaintiff in Error,
vs.
GEORGE O. MARCY,
Defendant in Error.

Error to Circuit Court of U. S. for N. D. of Illinois.

BRIEF FOR PLAINTIFF IN ERROR,

BY

MILTON T. PETERS.

MILTON T. PETERS & JOHN B. HAWLEY,
Attorneys for Plaintiff in Error.

Filed ..... *1873.*

..... *Clerk.*

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS CO., 161 AND 163 LA SALLE STREET.
1873.

Supreme Court of United States of America.

OCTOBER TERM, A.D. 1873.

THE TOWN OF OHIO,

vs.

GEORGE O. MARCY.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR THE TOWN OF OHIO, PLAINTIFF IN ERROR.

On the 26th of August, A.D. 1872, George O. Marcy, the defendant in error, instituted an action of assumpsit against the town of Ohio, on 400 coupons of which the following is a sample copy, to wit:

"$10. OHIO TOWNSHIP. No. 9

" RAILROAD
" INTFREST. I BOND WARRANT.

" Supervisor of the Township of Ohio, pay to bearer,
" January 1st, 1872, Ten Dollars, at the office of the State
" Treasurer, Springfield, Illinois.
" Wm. S. Wilson, Supervisor. J. W. Forney, Town Clerk.

(Record, pages 3, 10, 35.)

The other 399 coupons were in the same form, except each bore a special number, corresponding to the number of bond to which it was attached.

Said coupons were attached to certain railroad bonds, of which the following is a sample copy,) the others being in like form, only differing in numbers, and when payable.)

{ "Number } { Dollars }
{ "9. { United States of America. { 100. }

"State of Illinois.

"Ohio Township. Railroad Bond.

"Know all men by these presents, that the Township "of Ohio, in the County of Bureau, and State of Illinois, "is indebted to the Illinois Grand Trunk Railway, or "bearer, in the sum of one hundred dollars lawful "money of the United States, which the said Township "of Ohio promises to pay to the said Illinois Grand "Trunk Railway, or the bearer hereof, on the first day "of January, in the year one thousand eight hundred "and seventy-six, at the office of the State Treasurer, in "Springfield, Illinois, on the presentation of this bond, "with interest, from the first day of January, A.D. 1871, "at the rate of ten per cent. per annum, payable annu- "ally at the office of the State Treasurer in Springfield, "Illinois, on the first day of January in each year, on "the presentation and surrender of the annexed coupons "as they severally become due.

"This bond is issued under and by virtue of the "charter of said Illinois Grand Trunk Railway, and "amendment thereto, and other laws of the State "of Illinois, and in accordance with the vote of the "electors, of said township, at the special elec- "tion, held August 21, A.D. 1869, in accordance "with said charter and amendment and laws.

"In witness whereof, the said Township of

"Ohio has caused these presents to be signed
"by the Supervisor and Clerk of said Town-
"ship of Ohio, this first day of January, one
"thousand eight hundred and seventy-one.

"William S. Wilson, Supervisor.
"John W. Forney, Town Clerk.

"Indorsed on the back of said bond as follows:

"The Illinois Grand Trunk Railway,
"by

"A. H. Castle,
"President."

"Auditor's Office, Illinois.
"Springfield, April 15th, 1871.

"I, Charles E. Lippincott, Auditor of Public Accounts
"of the State of Illinois, do hereby certify that the
"within bond has been registered in this office this day
"pursuant to the provisions of an act entitled "An Act
"to fund and provide for paying the Railroad debts of
"Counties, Townships, Cities and Towns, in force April
"16, 1869.

"In testimony whereof I have hereunto subscribed my
"name and affixed the seal of my office, the day and
"year aforesaid.

[L. S.] "C. E. Lippincott,
"Auditor P. A."

Record, pages 33, 34, 35, 36.

On the 26th September, 1872, the plaintiff filed in said Circuit Court his declaration in the usual form, counting upon said coupons specially, with the common counts added. Record, pages 6 to 20.

On the 7th October, the defendant, said town, filed in said court its plea of non-assumpsit, with affidavit thereto annexed, denying the execution of the said bonds and coupons, and that the same, if executed by the supervisor

and town clerk, were without the authority of the town, and to defraud the town, and that the town was not indebted to the plaintiff, etc. Record, pages 20 and 21.

Oct. 6th, 1872. A stipulation was also filed, signed by the attorneys of the respective parties, that all of defendant's defenses should be admitted under the general issue, the same as though specially pleaded. Record, page 21–22.

At the March term, A.D. 1873, by stipulation in writing, a jury was waived and cause submitted to the court. On the 12th March, A.D. 1873, the court found the issues for the plaintiff, and assessed his damages at $4,286.60, and costs of suit taxed at $228.70. Record, pages 23, 24, 25.

The defendant excepted to the finding of the court, moved for a new trial, which was overruled, and defendant excepted. The court rendered final judgment for plaintiff, to which the defendant also excepted.

To preserve in the record the exceptions and the facts upon which the judgment of the court was predicated, a bill of exceptions was taken by the defendant, in which are embodied all of the facts proved upon the trial, as found by the court. Record, page 26.

The bill of exceptions recites that the parties had previously filed with the clerk of the Circuit Court their written stipulation waiving a jury. That the plaintiff, to maintain the issue upon his part, introduced in evidence the following, to wit:

1st. An act of the Legislature of the State of Illinois incorporating the Illinois Grand Trunk Railway, entitled "An Act to incorporate the Illinois Grand Trunk Railway, in force February 28th, 1867," and particularly sec-

tions 1, 2, 6, 10 and 11 of said act, as follows, to wit: (which are set out in the bill of exceptions.) Record, pages 26 to 30, inclusive.

2d. An act of said Legislature, amendatory of said last named act, of Feb. 28, 1867, in force March 25, 1869, as follows:

An act to amend an act entitled "An Act to incorporate the Illinois Grand Trunk Railway."

(In force March 25, 1869.)

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That any city, incorporated town or township, which may be situated on or near the route of the Illinois Grand Trunk Railway, west of the city of Mendota, *via* Prophetstown, to the Mississippi river, may become subscribers to the stock of said railway, and may issue bonds for the amount of such stock, so subscribed, with coupons, for interest thereto attached, under such limitations and restrictions, and on such conditions, as they may choose, and the Directors of said company may approve, the proposition for said subscription having been first submitted to the inhabitants of such city, town or township, and approved by them, and upon application of any ten voters of any city, town or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscriptions, it shall be the duty of the clerk of such city, town or township, immediately, to call an election in the same manner that other elections for said city, town or township are called, for the purpose of determining whether said city, town or township will subscribe to the stock of said railway; and if a majority of said votes shall be for subscription, then the corporate authorities of said city, town or township, and the supervisor and town clerk of

said township so voting, shall cause said subscription to be made, and upon its acceptance by the directors of said company, shall cause bonds to be issued in conformity with said vote; which bonds shall not be of less denomination than one hundred dollars, and in no case bear a higher rate of interest than ten per cent *Providing* no such election shall be held until at least thirty days' previous notice thereof shall be given in the manner prescribed by law.

SECTION 2. It shall be the duty of the proper authorities of any city, town or township issuing bonds as aforesaid, to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon; and to levy such taxes as may be necessary therefor as other taxes are levied by them.

SECTION 3. This act shall be liberally construed for the purpose intended and expressed therein, and shall be held to be a public act, and shall be in force from and after its passage.

Approved March 25, 1869.

(Record, pages 30, 31 and 32.)

3d. Bond with coupons attached sued upon, and proved the execution of the same by the supervisor and town clerk of said town. One-fifth of the bonds was due and payable in five years from date, and one-fifth each year thereafter until all were paid. Each bond had coupons attached each for $10, payable annually during the ten years. Record, pages 32 to 36.

4th. Proved by the deposition of the plaintiff, that he was a *bona fide* purchaser for value of the bonds and coupons sued upon before maturity, without any knowledge or notice of any defense or defect; that payment of the

coupons upon maturity had been demanded of the treasurer of the State at Springfield, Ills., and payment refused for want of funds. It was also proved that the town had not raised or appropriated any funds or taxes for the purpose of paying said coupons, and had no funds at any time, or at any place for such purpose. Record, page 36.

5th. Proved that the deft. was a township in Bureau Co., Ills., and *a municipal corporation under the general township organization laws of the State since* 1850; that it transacted its business in the corporate name of the town or township, either one, and that its territorial limit was a township of land, and that the Ills. Grand Trunk Railway passed directly through said town. Record, page 37.

6th-7th. The plaintiff read in evidence all the records and proceedings in regard to the election held on the 21st Aug., 1869, for the purpose of voting $40,000 subscription to the capital stock of said railway, bonds to be issued therefor of the denomination of $100 each and drawing interest at the rate *of ten per cent. per annum*, said bonds to be due and payable one-fifth in five years and one-fifth each year thereafter, said bonds to be issued and delivered on the expressed condition that said railway should be completed, and the cars running thereon for the purpose of carrying freight and passengers *through the town of Ohio* on the old grade, etc. The election was, in all respects, confessedly legal, except as follows, to wit: It was held by three judges of elections, under the general election laws of the State, instead of by a moderator and town clerk under the general township organization law of the State. The vote stood 125 for to 13 against subscribtion. 2d. Only legal voters were allowed to vote. 3d. The petition to call the election was not addressed to any one, but was filed in the office of the town clerk. 4th. The vote was to subscribe

stock to the Ills. Grand Trunk Railway *Co.*, when the company was called The *Ills. Grand Trunk Railway.* Record, pages 37 to 45.

8th. Plaintiff proved that the bonds and coupons were signed by the superviser and town clerk, in October, 1870, and handed to the supervisor and Pomeroy, a citizen of the town; that they, in the latter part of the same month, delivered the same to John Warfield, a citizen of Quincy, Illinois, an owner of lands in said town, and formerly a citizen of the town, with verbal directions to deliver the same to the said railway, upon its completion; that Warfield gave a receipt therefor to that effect, to the clerk and supervisor of said town. That *on the 6th Jan'y*, 1871, after having received written notice from the supervisor that the road had been completed, he delivered the bonds and coupons to the Railway Co. Record, page 46.

9th. The plaintiff proved that the said railway was completed and cars running there for the purpose of carrying passengers and freight from Mendota, through said town, on the old grade, as far as the station or depot in said town, on or before the 5th Jan'y, 1871, clear through said town, on *the 11th Jan'y*, 1871, and thereafter, to the Mississippi River. That prior to said 5th January, 1871, the depot had been located as required by the conditions of said vote. That it was generally understood that the completion of the road meant from Mendota through said town. Said bonds and coupons, soon after their delivery, were indorsed and sold to innocent purchasers, for the purpose of paying the indebtedness incurred in constructing said railway, and from such purchasers passed to the plaintiff. Record, page 47.

10th. That at the time of the delivery of said bonds and coupons, the said Illinois Grand Trunk Railway exe-

cuted and delivered to said town, a certificate of stock in said railway in the sum of $40,000, being 400 shares of $100 each in the capital stock of said railway, and accredited said town as one of its stockholders to that amount on its books. *That said certificate was received by the said supervisor of said town*, and filed away among the town records, and said town has never returned, nor offered to return, said certificate, but still retains the same. Record, page 48.

The defendant, to maintain the issue on its part, then read in evidence.

1st. The record and papers of the election of Aug. 21st, 1869.

2d. Proved, that said I. G. T. Railway did not formally accept and record its acceptance of said subscription authorized by the election of Aug. 21st, 1869, *until in October*, 1870.

3d. Proved, that in April, 1870, the president, secretary, and one director, who constituted a majority of the board of the directors of said railway company, met in conference sundry of the citizens of said town of Ohio, among whom was the supervisor, at which conference, the said president and secretary, expressed doubts as to the ability of said railway to build the road, under the conditions of the vote of Aug. 21st. 1869. That the president was requested to furnish a form to call a new election, but it was not proved, that said directors was in session as a board, or that they claimed by their statements to bind said railway. That some weeks afterwards the said secretary did furnish such form, at the request of one of the citizens of said town, but not in an official capacity, but for the accommodation of the citizen. Record, pages 48, 49, 50.

4th. That an election was held in said town on the 25th June, 1870, and the proposition to subscribe to the capital stock of said railway was rejected. The election was conducted by the three judges of elections, under the general election laws of this State. Record, page 50 to 55.

5th. That an election was held in said town on the 28th June, 1870, to vote aid to the Chicago & Rock River Railroad, a road projected to north and south through said town, at which election $40,000 was voted to the capital stock of said company. It was not proved that said railway had yet been commenced or constructed. Record, page 55.

6th. Proved, that Ills. C. T. Railway had constructed no road east of Mendota.

7th. Proved, that the persons named as directors in the act of February 28th, 1867, met for the first time, and organized as a board of directors by the election of officers, on the 20th January, 1870. Record, page 55.

8th. Read in evidence, 1st and 2d sections of the act of February 28th, 1869, and the whole of the act of March 25th, 1869, before copied.

9th. Proved, by the town clerk, John W. Forney, that when he delivered said bonds and coupons to supervisor Wilson, that he had an agreement with the supervisor and said Pomeroy, that the bonds were not to be delivered to the railway company without *his* and Wilson's consent, that he did not know what had become of said bonds; that he was never *consulted afterwards as to their delivery*. Record, page 56.

10th. The defendant proved that it had never voted, or *represented its stock in said railway in any way*, and had

not paid any part of said bonds or coupons, either of principal or interest, and that an injunction on the application of four citizens of said town was sued out from the Circuit Court of Bureau Co., Ills., on January 13th, 1871, to restrain the delivery of said bonds, which injunction on the filing of an answer showing the previous delivery of the bonds, was dissolved, and the bill dismissed. Record, page 56.

The plaintiff then filed in rebuttal as follows:

1st. That the persons named in the act of Feb. 28, 1867, as directors, accepted their said offices, and acted as directors until the formal organization of the board on the 20th January, 1870. That they caused in October, 1870, said subscription to be formally accepted and entered on record, and had never repudiated the same, or refused it. That said railway had not authorized the election of June 25th, 1870. That in July, 1870, they commenced preparations to build said railway, bought the old road, and *commenced the work of construction in October*, 1870, and pushed it to completion in reliance on said subscription, or vote, of Aug. 21st, 1869. That said railway had nothing to do with the election of June 25th, 1870. That the meeting held in April, 1870, was informal, and only for a conference, and at said meeting the officers of said road did not intimate that they would not accept or rely on the vote of Aug. 21st, 1869, and never claimed that a new election would have to be held. Record, page 57, 58.

2d. Proved, that the election of June 25th, 1870, was not required to repeal or replace that of Aug. 21st, 1869, but to offer better terms to the railway. Record, page 58.

The above were the facts, and all the facts, proved upon the trial.

The court found for the pltff. and assessed his damages at $4286.60 cents, to which the deft. excepted.

The deft. moved for a new trial, which motion was overruled, and deft. excepted. The court rendered final judgment for the pltff., to which the deft. excepted.

Bill of exceptions, duly signed and sealed by the Circuit Judge, and filed on the 12th March, 1873, in the office of the clerk of said Circuit Court. Record, page 59.

Bond for costs approved and filed, and a writ of error allowed, April 16th, 1873. Citation issued and served same day, also writ of error. Record, pages 60-65.

It is assigned for error, that the Circuit Court erred.

1st. In rendering judgment for the plaintiff below upon the facts found by the said court, to have been proved on the trial. *That said facts so found are insufficient to support the judgment of the court.*

2d. In not rendering judgment for the defendant below, as the facts found by the said court to have been proved upon the trial, showed that the defendant owed the said plaintiff nothing. And the said court should have found for the defendant, and that the defendant had not assumed and promised as on the declaration alleged, according to the facts found.

3d. The said court erred in allowing interest upon the 400 coupons declared upon, as in law such coupons did not draw interest. Yet the court allowed in the judgment $286.60, therefor.

4th. Court erred in overruling said defendant's motion for a new trial, and in rendering final judgment for the plaintiff.

1st. The plaintiff in error insists that the coupons

sued upon, with the bonds to which they were attached, were issued without the authority of the town, and are not the bonds and coupons of the town, because that the election of August 21st, 1869, from which the purported authority, if any, is derived, was illegal, null and void, and in law no election—for the reason that:

1st. The petition to call such election was addressed to no one, when the law required that the same should have been addressed to the town clerk.

2d. At said election only legal voters were permitted to vote, while by law all the adult male inhabitants, whether foreigners or citizens, were entitled to vote thereat.

3d. The vote was to subscribe stock to the Illinois Grand Trunk Railway *Company*, while the subscription was to the Ills. G. T. Railway—a corporation of a different name.

4th. That said election was held by three judges of elections, under the general election laws of the State, and not by the moderator and town clerk, under the township organization law, as required by the act under which said purported election was held. The election was, therefore, held by unauthorized parties, and without the authority of law, professedly acting and holding said election under a general law which was not *the law*, under which town elections, such as this was, were required to be held.

In support of the last proposition, I cite:

The People *v.* Dutcher. 56 Ills., 144.
Gross' Statutes of Ills., 1869, Chapt. 103, page 740, 747, 748, 778, 257.

Also:

Bigles *v.* Arkler, 47 Ills., 101.
The Commonwealth *v.* Co.Com's., 5 Ralle, 75.
McKune *v.* Meller, 11 Cal., 49.
Bateman *v.* McGowan, 1 Met. (Ky.) 533.
The People *v.* White, 24 Wendell, 520, 526.
Wilcox *v.* Smith, 5 Wendell, 234.
Pritchard *v.* People, 1 Gil., 525.

2d. That the Ills. G. T. Railway, having neglected until *Oct.*, 1870, to accept the proposition of the town to subscribe, voted at the election of August 21st, 1869, and the officers of said railway having as late as April, 1870, expressed to the citizens of the town doubts whether they would ever so accept, and the said town thereafter having called another election, to conform to the views of the officers of said company, and the people of said town having at said election, voted against the proposition to subscribe to said railway, and said railway not still signifying their acceptance of the proposition of the election of Aug. 21, '69, and the people of said town having voted to subscribe $40,000 to another railroad proposed to be constructed through the town, the supervisor and town clerk of said town had no authority after such unwarrantable delay on the part of the railway to accept the proposition of Aug. 21, '69, to issue the said bonds and coupons in October, 1870, without the authority of said town having been obtained *subsequent* to Aug. 21, '69—and as the Constitution of 1870 had then taken effect, the said officers were precluded thereby from doing so without the authority of the town having been so signified *since the adoption of the Constitution of* 1870.

3d The bonds and coupons were issued in October, 1870, and delivered on the 6th of January, 1871, when said railway was not completed until the 11th of January,

1871. The delivery was by the sole authority of the supervisor, and without the consent of the town clerk, and therefore there was no legal delivery of said bonds and coupons.

4th. The *express conditions* required to be inserted in said bonds by the election of August 21, 1869, were wholly omitted in said bonds, and therefore the bonds and coupons sued upon, are not such as the town had authorized to be issued, and therefore the same were issued without authority.

5th. By the said election of August, 21, '69, bonds were authorized to be issued, *but not coupons*, the bonds to be payable, one-fifth five years from date, and one-fifth each succeeding year thereafter, *with ten per cent. interest per annum*. Bonds were issued with coupons attached for the interest, payable *annually*.

The authority was violated in two respects:

1st. By the issue of coupons when they had not been authorized.

2d. The interest was made payable *annually*, when no part of the bonds voted, either of principal or interest, were to have become due under five years.

6th. When the election of August 21, '69, was held the Ills. G. T. Railway had not been organized, and had no legal existence. Therefore the election was a nullity, because the vote was to subscribe to a company not then in existence.

7th. The facts, as found by the court, show that the vote of August, 21, '69, was to subscribe to aid the construction of a railway from Mendota west. The plaintiff's witnesses testified that such was the general under-

standing. The act of March 25, 1869, authorized the town to subscribe only to the Ills. G. T. Railway, which was defined by its charter (the act of February 28, 1867) to be a railroad, to be extended from Chicago, or the east line of the State of Illinois to the Mississippi river. Therefore said subscription was unauthorized by law, and necessarily the bonds and coupons issued in pursuance thereof are null and void.

The aforesaid objections to the validity of the bonds and coupons are jurisdictional. They attack the purported authority upon which the same were issued, and establish *a want of such authority*. The bonds upon their face purport to have been issued in pursuance of the charter of said G. T. Railway, the amendment, etc., and *said election of Aug.* 21, 1869, consequently the purchaser of said bonds and coupons had notice of the said acts of the Legislature and the record proceedings of said election of Aug. 21, 1869, and they not having authorized the issue of the bonds and coupons aforesaid, the plaintiff is not protected from the defects and infirmities aforesaid that destroy their validity. The reason and authority for the support of this reasonable and self-evident proposition is contained in a former decision of this court, Marsh *vs.* Fulton Co., 10 Wallace, 676, in which this court said (Justice Field delivering the opinion): "Even if the party holding the bonds be an innocent holder, he is bound to look to the action of the officers who issued the bonds and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must arise before any protection as innocent purchaser can be claimed by the holder. In a case where the power to contract never existed, the instrument might with equal authority have been issued by any other citizen. It is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such

" reason be taken without special inquiry into their valid-
" ity. The power of ratification does not lie with the
" officers. A ratification can only be made when the
" party ratifying possesses the power to perform the act
" to be ratified.

" A subscription to railroad stock could not be ratified
" without a vote of the people authorizing it, because the
" original subscription could not be made without such
" vote. If the power to issue bonds in aid of a railway
" and other like enterprises has not arisen by reason of
" an absolute non-compliance with conditions precedent,
" they are void, into whosoever hands they may come.
" When bonds are issued to a railroad company without
" authority, they are void in the hands of an innocent
" purchaser."

Marsh *v.* Fulton Co., 10 Wallace, 676.

" The public agents of the city of Burlington, Iowa,
" could not cure the inherent defects in their action, aris-
" ing from the want of power by any amount of represen-
" tation upon the face of the bonds that they had the
" requisite authority to issue the same.

Dissenting opinion of Justice Field, Chase, Miller and Greer concurring.

Rogers *v.* Burlington, 3 Wallace, 672.

" Limited corporations, such as townships, or towns
" under township organization, are not municipal corpo-
" rations but only quasi corporations, and possess much
" more limited powers than incorporated towns and
" cities.

" Dillon on Corporations, page 31, sec. 10, note 1.

" The Town of Waltham *v.* Kemper, 55 Ills., 346.

"The acts of town officers in executing railroad bonds "are merely ministerial, not judicial.

Houston *v.* The People, 55 Ills., 398.

In support of the said seven points, I cite:

School Directors *v.* Shippey, 54 Ills., 287.
Little Rock *v.* State Bank, 3 English (Ark.) 227.
Inhabitants *v.* Nest, 9 Ind., 224.
Ramsey *v.* P. M. and F. Ins. Co., 51 Ills., 313.

But I shall not further discuss these points, although they are vital and ought to be sufficient to reverse the judgment of Circuit Court, because it would appear from the cases on such bonds decided by this court since the case of Marsh *v.* Fulton Co., that this court now holds the recitals in such bonds, to preclude the corporations executing the same from setting up any other defenses than those apparent on their face. Such appears to be the conclusion of this court in

Pendleton Co. *v.* Army, 13 Wallace, 297.
City of Lexington *v.* Butler, 14 Wallace, 283.
Grand Chute *v.* Winnegar, 15 Wallace, 355.

Such being my understanding of the court's decisions in said cases, I fear that it would be considered a trespass upon the time and attention of this court to argue those points in detail. I therefore content myself with a simple statement of them, hoping that this court may give them their careful examination and consideration, and that the court, if they believe them to be well taken, or not clearly within the parview of said decisions, will give the town of Ohio the relief in the premises, which in justice they are entitled.

I now proceed to discuss the defects of and objections

to the validity of said bonds and coupons, apparent on the face of such instruments.

8th. Said bonds and coupons are signed by the supervisor and town clerk, and by no other officer of said town. They do not purport to be issued upon the authority, or by the direction, of the corporate authorities of said town, or of any other officer of said town, but solely by the authority and direction of the supervisor and town clerk, who, in law, had no authority to create or audit any debt against said town. Therefore said bonds and coupons are void upon their face, in showing thereon that they had been issued without competent legal authority.

By the Constitution of 1848 of the State of Illinois, which remained in force until superseded by that of 1870, ratified in July of that year, it was provided in Article 9, Sec. 5, as follows, to wit: "*The corporate author-*
"*ities of counties, townships*, school districts, cities, towns,
"and villages may be vested with power to assess and
"collect taxes for corporate purposes. Such taxes to be
"uniform in respect to persons and property, within the
"jurisdiction of the body imposing the same."

The Supreme Court of the State of Illinois, by repeated decisions, have uniformly held that such Constitutional provisions *inhibits the Legislature* from authorizing any other persons or officers to create an indebtedness against such corporation.

"The fifth section of Article 9 of the Constitution of
"Illinois, adopted in 1848, forbids the Legislature to
"grant the power of local or corporate taxation to any
"other persons than *the local or corporate authorities.*"

Howard et al. *v.* St. Clair Co. Drain Co., 51 Ills., 133–4–5.

Only the corporate authorities can levy a tax, *or create a debt.*

People *v.* Salamon, 51 Ills., 48.
People *v* Mayer, 51 Ills., 30 and 31.
Wilder *v.* City of East St. Louis, 55 Ills., 136.

"The power to levy a tax or create a debt, to be dis-
"charged by the levy of a tax, *are the same thing.*"
Livingston *v.* Wilder, 53 Ills., 305.
People *v.* Mayer, 51 Ills., 31.

The election under which it is claimed is derived the power to issue the bonds and coupons sued upon was held on the 21st August, A.D. 1869, while said Constitution of 1848 was the supreme law of the land. So that the Legislature of the State of Illinois had not the constitutional authority to authorize the supervisor and town clerk of said town to create an indebtedness against said town, they could have only authorized the general corporate authorities of the town to create such indebtedness, as the Supreme Court of this State have uniformly decided in the aforesaid cases, reported in the 51st, 53d. and 55th vols. of the Reports of the Supreme Court of this State.

That the supervisor and town clerk are not the corporate authorities of a township, or town under the general township organization laws of this State—such as the defendant on this trial was proved to be—was decided by the Supreme Court of this State, at Sept. term, A.D. 1871, of said court,in the case of

Brimfield Township *v.* Dixon, Peoria & Hannibal Railroad Co.

The opinion is not found in the printed reports of that court, for the reason that such printed reports have not reached to that time, but I will furnish this court with

manuscript copy of such opinion, *duly certified by the clerk of said court*. That court say in such opinion, as follows, to wit:

"That a town or township has no authority to take "railway stocks, and issue railway bonds, independent of "legislative action, and that a vote at a special town "meeting, held under the township organization laws, "confers no such power without special legislation. That "a subsequent issue of town bonds cannot be taken, as "showing the assent of the town or township. That is "merely a ministerial act of the supervisor and town "clerk. That the town clerk and supervisor do not re- "present a township, as the board of trustees represent "an incorporated town, or the common council represent "a city. The supervisor and town clerk are but a part "of the corporate authorities. They had no power of "taxation, nor power of themselves, to bind the town- "ship in any way. That the supervisor and town clerk "are not elected for the purpose of creating a debt "against the town, or imposing a tax. *They are not the "corporate authorities of the town.*"

This opinion settles the question that the supervisor and town clerk are not the corporate authorities of the town. The general organization laws of this State, in force when the act of March 25th, 1869, was passed, clearly defines who are the corporate authorities of the town or township.

Gross' Statutes of Illinois, 1869, art. 10, page 753, declares that the "supervisor, town clerk, and justices "of the peace of the town, or in case of the absence of "any or either of them the assessor or collector of the "town, or both, as it may be, constitute the board of "auditors, to examine and audit all claims against their "respective towns. The said board, or majority of them,

"are required to make a certificate, to be signed by a "majority of the board, of the nature of the claim or "demand, and to whom the amount is allowed, and de- "liver the aggregate amount to the supervisor, to be by "him, laid before the board of supervisors at their an- "nual meeting: and the board of supervisors shall "cause the amount of said charges to be levied upon the "property of said town, and be collected as other taxes "are levied and collected."

So there can be no doubt as to who are the corporate authorities of a town or township, and, also, that the supervisor and town clerk are not such corporate authorities, *but only a minority thereof*, and have no authority to allow claims against a town or township, or issue any certificates of indebtedness therefor.

In the Brimfield Township case, last cited, the Supreme Court of this State held that the Legislature of the State of Illinois *could not confer upon the supervisor and town clerk the authority to tax a town or create a debt; that they were elected for no such purpose, and are only a part of the corporate authorities of the town or township.* So if, as will be contended by counsel for defendant in error, the Legislature, by the act of March 25, 1869, intended to confer upon the supervisor and town clerk the authority to make the subscription and issue the bonds and coupons sued upon, then, according to the decisions of the Supreme Court of this State, said act is unconstitutional; but it is apparent that the Legislature did not so design by said act, but required *the corporate authorities of the township* and the supervisor and town clerk to concur therein. In the absence of the town clerk and supervisor, or failure to attend the town meeting, the justices of the peace, collector and assessor of the town, or a majority of them, would constitute the board of auditors of the town, and would be the actual corporate authori-

ties of such town at such meeting, who could have issued the bonds and coupons and made the subscription, as the corporate authorities of the town, did not the act of March 25, 1869, *require the supervisor and town clerk also to concur therein.*

But it will be insisted that the election, being in favor of subscription, there was thereby a contract between the town and railroad company, and that the supervisor and town clerk were only acting ministerially, in giving form to a contract already subsisting and complete. To this I reply that by the act of March 25, 1869, the voters at the said election had the right, as they did, to prescribe conditions as to the proposed subscription and the payment of the same.

That at said election *an unconditional subscription was not voted;* that by the terms of said election, said bonds were to be issued and delivered, *only on this express condition:*

"That the aforesaid Grand Trunk Railway shall be "completed and the cars running thereon, for the pur- "pose of carrying passengers and freight from Mendota, "through the town of Ohio on the old grade."

Before any bonds were to be issued, the corporate authorities would have to determine that these conditions had been complied with; for until they were complied with there was no authority or obligation upon the town to issue the bonds and coupons. This determination called for an exercise of judgment on the part of the corporate authorities, for if the decision was that the conditions aforesaid had been performed then the bonds were to be issued, *and only then*, and the indebtedness *then accrued, and not till then.*

In this case it was the supervisor and town clerk who necessarily decided that such conditions had been com-

plied with, and thereupon issued the bonds and coupons. Consequently the supervisor and town clerk, *and they alone*, created the purported indebtedness, which under the Constitution of the State they had no power to do. The Constitutions of 1848 and 1870 are alike in this respect. They then, as also the act of March 25, 1869, were violated by the supervisor and town clerk, in attempting to create the indebtedness aforesaid.

2d. If at this election an unconditional subscription had been voted, instead of a conditional one, still it would have been no contract between the town and the railroad company.

"A railway cannot compel a county to subscribe to its "stock, although an election has resulted in favor of the "subscription. *Until the subscription be made*, it is entirely "at the option of the railroad company whether they will "permit it. *Before the subscription is made, no obligation "exists between the parties.* The company is no party to "vote, and has no right to insist upon the execution of "the power delegated."

People *v.* Tazewell Co., 22 Ill., 154-5-6.

"When by law, an election was to be held, to decide "whether the county would subscribe stock to a railroad "company, and the election was in its favor, it was held "that no contract existed on the part of the county to "subscribe, and the county was not bound *until the sub-"scription was made*, although the law under which the "election was held declared that the county authorities "*should so subscribe* if the election was in favor of sub-"scription."

Aspinwall *v.* The Commissioners of the County of Davies, 25 Howard, 364.

"An authority given in a railroad charter to take

"stock and issue bonds therefor if a majority of the vot-
"ers so determine is not a contract, although the election
"was in favor of subscription."

Dillon on Corporations, page 88, § 42.

Under the Constitution of 1870, municipal corporations alone have the power to assess and collect taxes. Art. ix, § 9.

By separate section, No. 2 of said Constitution, counties, townships, etc., are forbidden to subscribe to the stock of railroad companies, except such MUNICIPALITIES HAVE THE RIGHT to make a subscription when the same had been authorized under existing laws by a vote of the people had prior to the adoption of said section. Art. ix, § 12 of same Constitution forbids indebtedness over five per cent. on the taxable property of towns and townships, etc., but provides that said section shall not be construed to *prevent any township, etc.*, from issuing their bonds in compliance with any vote of the people had prior to the adoption of the Constitution.

Under said section 2 first referred to, townships have *the right to subcribe* when authorized by elections held before the adoption of said section, but are not *compelled* to so subscribe. And the township has the right to issue its bonds under the last named section, but cannot be compelled to do so. It is the TOWNSHIP *alone that has such power to subscribe and issue bonds, not the supervisor and town clerk.*

The township not having subscribed or issued their bond through their corporate authorities, who alone would have the power to represent such township, but the same having been issued by the supervisor and town clerk alone, in October, 1870, after the Constitution of 1870 had taken effect and after the election, of *August* 21, 1869,

had been virtually abandoned and the railway company having never until then signified their acceptance of the said proposed subscription, the bonds and coupons thereupon issued were issued without authority, and against the provisions of the Constitution of 1870 and are therefore null and void.

By the act in force March 25, 1869, to amend an act to incorporate the Illinois and Grand Trunk Railway, it was provided, that "cities, towns, and *townships* might "become subscribers to the stock of said railway, and is- "sue bonds for the amount of the stock subscribed with "coupons *under such limitations and restrictions, and on such* "*conditions as they may choose and the directors of said company* "*may approve.*"

"The proposition for said subscription, having been "first submitted to the inhabitants of such city, town, or "township, and approved by them. The act further "provides, that if at an election called for that purpose, "a majority of the votes shall be for subscription, *then the* "*corporate authorities of said city, town or township*, and "the supervisor and town clerk of said township, so vot- "ing, shall *cause said subscription to be made*, and upon "*its acceptance by the directors of said company shall cause* "*bonds* to be issued in conformity with said vote."

By this act, the bonds and coupons are to be issued by "*the corporate authorities of the township, and the super- visor and town clerk*," and not by the supervisor and town clerk alone, as was done in the case of the bonds and coupons sued upon. It may be insisted by the de- fendant in error, that there are no corporate authorities of a town or township, under township organization, and therefore the expression "corporate authorities" could not apply to such town or township. But this is entirely

a mistake. The Constitution of the State of Illinois, adopted in 1848, and in force when this law was passed and election held, provided as follows:

Art. IX. § 5. "*The corporate authorities of counties,* "*townships,* school districts, cities, towns and villages, "may be vested with the power to assess and collect taxes "for corporate purposes."

Here is an express constitutional recognition of corporate authorities for towns and *townships*, and if there be no corporate authorities for towns or *townships*, then there is no authority for such towns or townships to assess and collect taxes for corporate purposes, and likewise no power in such towns and *townships to create a debt to become due from said town or township*, as they are one and the same thing, as decided by our Supreme Court. But the Supreme Court of the State of Illinois have decided that *such towns and townships* have *corporate authorities*. I refer to the case of Brimfield Township, *v.* Dixon, Peoria and Hannibal Railroad Company, before cited, in which the Supreme Court of this State held as follows:

"*The supervisor and town clerk are but a part of the cor-* "*porate authorities. They have no power of taxation. No* "*power of themselves to bind the township in any way.*" "That the supervisor and town clerk are not elected for "the purpose of creating a debt or imposing a tax. They "are not *the corporate authorities of the town.*"

The position taken is substantially this, that the Supreme Court of the State of Illinois have decided, that the Legislature could not authorize any persons or officers *except the regular corporate authorities of the corporation* to create a debt of any kind to be paid by such corporation. This has been held in the following cases.

Howard et al. *v.* St. Clair Co. Drain Co., 51 Ills., 133-4-5.

People *v.* Salamon, 51 Ills., 48.
People *v.* Mayer, 51 Ills., 30-31.
Wilder *v* City of East St. Louis, 55 Ills.. 136.
Livingston *v* Wilder, 53 Ills., 305.

The supervisor and town clerk are not the corporate authorities of a town or township, under the [illegible] organization law. The statute does not make them such, but, on the contrary, by statute, they constitute only a part of such corporate authorities. Gross' Statutes of Illinois, Art. 10, page 753. The Supreme Court of this State has also decided that they are not such corporate authorites, but only a part thereof. Therefore, if the Legislature, by the act of March 25, 1869, designed to confer on the supervisor and town clerk the power of themselves to make the subscription, and issue the bonds and coupons, then such statute is unconstitutional. But the statute is constitutional, because the said act required the *corporate authorities and the* supervisor and town clerk to act in conjunction in making the subscription and issuing the bonds and coupons. The corporate authorities and town clerk did not so act in conjunction; but the supervisor and town clerk acted alone, the corporate authorities having had no action in the premises. Therefore, the subscription and bonds and coupons issued were without competent legal authority, and are, therefore, void. The vote in favor of the subscription at the election of August 21, 1869, conferred on the *corporate authorities of the town and* supervisor and town clerk the power to make the subscription and issue bonds, under certain conditions; *but this power was not conferred upon the supervisor and town clerk alone*, and they having exercised a power not conferred upon them, the exercise thereof is not binding upon the town.

If it be replied that said act of March 25, 1869, cannot be taken in a literal sense, otherwise the corporate

authorities of a *city and* the supervisor and town clerk "are to issue the bonds and coupons, in case of a city, which would be wholly unnecessary for the supervisor and town clerk to so unite with the corporate authorities of a city. Grant it in case of a city; but it would be necessary in case of a town or township, under the township organization law; because, in the latter case, there are corporate authorities, *and also a supervisor and town clerk, while in case of a city there are* no such officers, and the words "supervisor and town clerk of said township" do not, therefore, refer to a city voting stock, but to a township so voting. Said words in this connection do not even literally refer to a city.

The Legislature, under the State Constitution, could not confer upon the supervisor and town clerk this power, and did not attempt to do so. But at the same time, the legislature did direct that the supervisor and town clerk should act therein in conjunction with the corporate authorities, as they, the supervisor and town clerk, were the principal officers of the town. Had the bonds and coupons been signed by the supervisor, town clerk *and another member of the board of auditors of the town, who alone* have the power to audit or create debts against the town and levy taxes, then the bonds would not have been invalid upon their face. But the bonds and coupons being signed by the supervisor and town clerk only, *and they not even purporting to have been issued by the authority of the board of auditors, or corporate authorities of the town, they are void upon their face.*

"The act of March 28, 1869, is explicit, that the cor-
"porate authorities of said city, town or township, *and*
"*the supervisor and town clerk of said township so voting* shall
"cause subscription to me made, and upon its acceptance
"by the directors of said company, shall cause bonds to
"be issued in conformity with said vote."

To make subscription and issue bonds on the part o a township, require the exercise of the agency of the corporate authorities, the same as in case of a town or city.

The language of the act is the same in regard to cities, towns and townships, and the construction must be the same in regard to the exercise of the agency of the corporate authorities. To give the construction contended for by the defendant in error, the word township would have to be stricken from the act, and this no court can do. Without the word township is so stricken out, the bonds and coupons are void under the act itself, aside from the constitutional prohibition aforesaid. The words corporate authorities cannot be limited to towns and cities, because the said act does not so limit it, but the same are applied in said act to cities, towns and townships equally alike.

But it will be claimed that the town ratified the subscription to the Ills. G. T. Railway, and the issue of the bonds and coupons, by having had received and not returning the certificate of stock, and the case of Pendleton Co. v. Amy, 13 Wallace, 297, will be cited in support of this claim. In that case it was averred in the declaration and not denied by the 3d plea, (the one demurred to) that the county had, 17 years before, issued the bonds and coupons sued upon to the railroad company, and that a certificate for the shares of stock subscribed as aforesaid, was issued to the county, and *was received by it*, and *that it was still owned by the county*. The court say in their opinion that, "The *county received* in exchange for "the bonds, a certificate for the stock of the railroad "company, *which it held about seventeen years before the* "*present suit was brought, and which it still holds*. Having "exchanged the bonds for stock, can it retain the pro- "ceeds of the exchange and assert against a purchase of

"the bonds for value, that though the Legislature em-
"powered it to make them, and put them upon the
"market upon certain conditions, they were issued in
"disregard of the conditions? We think they can not,
"and therefore that the third plea cannot be sustained."

In that case *the county* received and retained the stock certificate, *and still owned the stock.*

While in the case now before the court it was the *supervisor that received the stock certificate, not the town.* It is true he placed it among the papers of the town clerk's office, but it is not shown that the town was even aware of the fact it was there, or that they had any notice of the same. It is true the town did not return it, but it is not shown that the proper town officers or corporate authorities knew that there was any certificate to be returned, but it is shown that the Railway Co. knew *that the town had repudiated the action of the company*, the town having never voted or represented the said stock in any way, and having never paid either the principal or interest of the purported bonds and coupons issued by the supervisor to pay for said stock. The town clerk did not consent to the delivery of said bonds. *The supervisor was acting in complicity with the Railway Co.* to prevent an injunction from being issued and served, to stop the delivery of said bonds. He, on the 6th January, 1873, directed John Warfield, the custodian of said bonds and coupons, to deliver the same to the company, and they were on that day so delivered to the company, when said company had no right to claim the delivery of said bonds until the 11th January, 1873, the day when the said railway was first completed through the town, as such was the condition of the town's subscription to the said railway, and this the supervisor did without the consent or even consulting with the town clerk, as he had agreed when he and the town clerk signed

the bonds in October, 1870, and deposited them with John Warfield, a citizen of Quincy, Ills., so as to have them taken out of the county, and held by some one unknown to the citizens of the town, so that the issuing of the same could not be enjoined, as the same was subsequently attempted and failed, by reason of the said supervisor having had the said bonds and coupons secretly and fraudulently made and delivered to the Railway Co. *in advance* of the time the company had any right to claim them. The supervisor, by his said illegal action, could not affect the rights of the town, nor was the town under any obligation to offer to return the certificate, as they had never received it or taken any action in regard to it, except to not recognize it in any way as the property of the town, and not pay either principal or interest of said bonds and coupons. In the case of Pendleton Co. *v.* Avery, the *county had held the stock for* 17 *years, and owned it at the time of the suit brought.* In this case, the town never held it, and did not own it when the suit was brought, and had never claimed to own it. It is not shown what had become of said stock, or even that the Railway Co. had continued the town on its books as a stockholder, or had ever treated the town as a stockholder *after* the time they received of the supervisor the bonds and coupons of the town, and certainly the town had never in any way treated itself or the railway company as being a stockholder. The Railway Co. was not misled by any action of the town to believe that the town considered itself a stockholder, but said company knew all the time that said town did not, as the town had not in any way treated said stock as its own or represented it in any way.

There can be no *implied* ratification of the said illegal acts of the supervisor, or the supervisor and town clerk. The ratification *must be express*, to be *binding* upon the town.

"In the case of municipal corporations, debts illegally "contracted by its officers can not be made binding upon "the tax payers *from the presumed assent of the latter.*"
Bradley *v.* Ballard, 55 Ills., 420.

In the case before the court there is no pretence that there was an express ratification, and therefore no legal ratification at all. There was not even a plausible color of an implied ratification. So that if the action of the supervisor and town clerk in issuing said bonds and coupons was unauthorized, the same cannot now be enforced against the town. That such action was illegal I think is clear. That the same was in violation of the Constitutions of this State, and of the act itself, under which said bonds and coupons purport to have been issued.

9th. The coupons declared upon make no substantive cause of action. They are not negotiable paper, and the plaintiff as assignee, had no right to a recovery.

The township of Ohio is the purported obligor in the bonds, and they purport to have heen executed by the supervisor and town clerk of *said township.*

The coupons read as follows, to wit:

"$10. *Ohio Township.* No. 9.
"Railroad Bond. Interest Warrant.
"Supervisor of the *township of Ohio*, pay to the bearer, "January 1st, 1872, ten dollars, at the office of the State "Treasurer, Springfield, Illinois.
"Wm. S. Wilson, J. W. Forney,
"Supervisor. Town Clerk."

"Indorsed upon the bond, "The Ills. Grand Trunk "Railway. A. H. Castle, President."

The form of the action is assumpsit.

The township of Ohio is no municipal corporation. It was proved that the town of Ohio is one of the towns of Bureau county, under the general township organization law, under which said county is organized, and comprises a township of land; that business is done in the name of the township or town, either one.

It is immaterial as to how the business has been done; that could not change or make the law; that could not make a municipal corporation in case there was none in law. In law there is no such municipal corporation, or quasi corporation of any kind, as *the Township of Ohio*. The name and style of the corporation is the Town of Ohio, and by that name and style the law requires all its acts to be done. Gross' Statutes of Illinois, pages 742, 743, Sec. 6, 7, 1, 2, 3. The last section, No. 3, on page 743, provides: "*All acts or proceedings, by or against a town "in its corporate capacity, shall be in the name of the town.*"

There being no such corporation as the "Township of Ohio," the bonds and coupons sued upon made no substantial cause of action, because they purport to be executed on behalf of a corporation that has no legal existence, called by a different name from the one sued. Even if the said paper, in connection with other testimony, would establish a liability on behalf of the town, *yet as the paper itself without such extraneous proof makes no substantive cause of action*, they are not negotiable instruments, and the plaintiff cannot sue in his own name as assignee of such non-negotiable paper.

2d. The coupons which alone are sued and declared upon, are void upon their face, not only because they purport to be executed on behalf of a corporation that has no legal existence, and is called by a different name from the corporation sued, but because they contain in

fact no promise to pay on behalf of either town or township, but merely an order on the supervisor, signed by the supervisor and town clerk only, who, under the general township organization law of the State of Illinois, can not audit, create or certify to any indebtedness whatever against either a town or township, but the same can only be allowed by a majority of the board of auditors, and the certificate of such indebtedness must be *signed by a majority of such board.*

Gross' Stat., of Ills., 1869, page 753, Sections 2 to 9 inclusive.

Under the general funding law of the State, the State Treasurer and not the supervisor of the town, is entrusted with the money to pay bonds and coupons. It is the duty of the state treasurer to pay the same, and not the supervisor of the town. The supervisor has no charge of the railroads funds, or funds to pay railroad bonds and coupons

Gross' Stat., 1869, pages 555, 556; Secs. 108, 109, 110.

10th. There was no demand of payment of the coupons sued upon before suit brought, and therefore the action was premature.

"No sound reason can be given why a town should be "subjected to the perplexity of the costs of an action "before the payee of an order will do his duty and re- "quire payment. There is an implied engagement to "conform to established usage and present the order for "payment."

Vamer *v.* Noblebury, 2 Greenleaf (Maine) 121.

"*Until demand made a city or town is not in default.* They

"are not like individuals, bound to seek their creditors to "make payment of their indebtedness. Municipal cor- "porations cannot ever bind themselves to pay their "*indebtedness at any other place than their treasury, unless* "*specially authorized by legislative enactment. Their debts are* "*payable at the treasury of the body.*

City of Pekin *v.* Reynolds, 31 Ills., 532.

That the town had no money to pay, would not dispense with the necessity of a demand, any more than a note payable at sight could be sued and recovered upon presentation, upon proof that the maker had no money in his pocket or treasury.

Until demand of payment be made no money is needed. Until the town has been put in default there is no right of action. In this case there was no demand on the supervisor of the town or the town itself, before suit brought. The town had no right to make the coupons payable at Springfield, Ills. They had no authority to make them payable any where, other than at the treasurer's office in the town, without a special enactment to that effect, and there was no such enactment. The general funding law provides that the holders of bonds and coupons may present them for payment to the State Treasurer at Springfield, and if he had any funds of the town in his hands for that purpose, it is his duty to pay them. *But there is no law authorizing the bonds and coupons to be made payable at Springfield.* Therefore, any demand made there is in law no demand, because the town had no legal authority to make them payable there.

11th. The plaintiff, if entitled to recover at all (which he was not), should have had a judgment for $4,000 only, there being sued 400 coupons of $10 each. The court gave judgement for $4,286.60, of which $286.60 was for

interest, when said coupons did not draw interest according to the laws of the State of Illinois and the decisions of the highest legal tribunal of this State.

"The indebtedness of counties, towns and cities are "payable at the treasury of the body, and in the absence "of *express legislation their indebtedness does not bear interest*, "*unless by special agreement. Coupons to railroad bonds do not* "*draw interest.*" They are like county orders in that respect.

City of Pekin *v.* Reynolds, 31 Ills., 532.
City of Chicago *v.* The People *ex rel.*, 56 Ills., 334.

The bonds provide that they shall draw ten per cent. interest, and for which interest the coupons are annexed thereto: but there is no agrement either in the bonds or coupons that the coupons shall bear interest. The contract on the part of the town, if any, was for the payment of simple interest; 10 per cent. interest on the amount of the bonds, not to pay interest upon the coupons: that is interest upon interest.

The Circuit Court allowed compound interest, to wit, interest upon the coupons, that is interest upon interest. In which the court erred. The contract between the parties, the bonds and coupons sued upon, were made in Illinois, and, of course, our laws, as construed by the Supreme Court of this State, govern as to the construction of the contract, which is that the said coupons do not draw interest.

"The construction given to a State statute by the high- "est judicial tribunal of a State, is regarded as a part of "the statute, and is as binding upon the courts of the "United States, as the text." Leffingwell *vs.* Warren, 2 Black, 599.

We think, in the aforesaid points, the Circuit Court clearly erred, and that its judgment should be reversed.

MILTON T. PETERS,

J. B. HAWLEY,

Attorneys for The Town of Ohio, Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A.D. 1873.

THE TOWN OF OHIO,
Plaintiff in Error,

vs.

GEORGE O. MARCY,
Defendant in Error.

Error to the Circuit Court of the U. S. for N. D. of Ills.

REPLY OF THE PLAINTIFF IN ERROR

TO THE PRINTED BRIEF AND ARGUMENT
OF THE DEFENDANT IN ERROR.

MILTON T. PETERS, and
JOHN B. HAWLEY,
Attorneys for Plaintiff in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS CO., 161 & 163 LaSALLE STREET.
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REPLY OF THE PLAINTIFF IN ERROR TO THE PRINTED BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

The counsel for defendant in error has consumed 42 printed pages of his brief to reply to the seven objections of plaintiff in error to the legality and validity of the bonds and coupons sued upon, not apparent upon the face of said bonds, when counsel for plaintiff in error had only devoted six pages of his brief to the statement and consideration of such objections; he conceding, in such brief, that it would appear that this court now held that the recitals in such bonds precluded all other defenses, except those apparent on the face of such instruments,

and therefore he would not further press those points. From this it is evident that the counsel for defendant in error has "his piece," and was bound to say it anyhow. Counsel for plaintiff in error shall not reply to these 42 dreary pages, as he fears this court will decline to consider any objections to the validity of said bonds and coupons not apparent on their face, only remarking that most of those decisions cited are not in point, or against the positions of counsel for defendant in error, as his reasoning therein is unsound.

The 8th objection of plaintiff in error to the validity of said instruments is, that they are void upon their face, they having only been signed by the supervisor and town clerk, and not purporting to have been issued by the authority or direction of the corporate authorities of said town.

Counsel for defendant in error, attempts to answer this objection by claiming that the act of March 25th, 1869, does not require the bonds and coupons to be *signed* by the corporate authorities of the town or township, and supervisor and town clerk, but only to be *issued* by them. He drawing a distinction between the signing and issue of the bonds. The illustration which he cites of a board of supervisors of a town signing by their chairman, and of a county by their chairman and clerk, refutes his position. For in such cases the bonds were issued by the proper board of supervisors, *and signed by them also, in the manner the law required the board to sign all instruments, to wit: by their chairman or chairman and clerk.* In this case the corporate authorities, or board of corporate

authorities of the township or town of Ohio had no chairman or clerk, or rather the supervisor and town clerk was not their chairman or clerk and had no authority in law or fact to sign or execute any instruments for the corporate authorities of the town or township. The corporate authorities thereof could only sign, execute or issue any paper, by signing their own proper names thereto, or a majority thereof.

Had the counsel for defendant in error been as anxious to *understand* the decisions he cited, as to pile *them* up — he would by examination of the cases of the town of Grand Chute *v.* Winegar, 15 Wallace, 358, 373; Johnson *v.* The County of Stark, 24 Ill., 78, 82, cited by him, have learned that in the first case, that the bonds sued on recited: "Whereas, the said board of supervisors, at a meeting of their board, did agree by resolutions of said board, to subscribe the sum of $10,000 to the stock of the Wolf River Branch Plank Road Company, and that the said town issue bonds to the amount of said subscription to the said Plank Road Company, and that *the said bonds be signed by the chairman of the board, under the seal of said town*," and which bonds were accordingly so signed and sealed by the chairman.

If these bonds and coupons sued upon had recited that at a meeting of the town auditors or corporate authorities of the town of Ohio, it was ordered, that said bonds and coupons should be issued and *signed by the supervisor and town clerk*, then said bonds and coupons would have shown on their face, that they were issued by the authority of the proper authorities of the town; but as said

bonds and coupons contain no such recital, but purport to be issued and signed by the supervisor and town clerk only, they are void upon their face.

And in the other case cited by counsel, of Johnson *v.* County of Stark, 24 Ill., 77, the plaintiff, to sustain the validity of the bonds and coupons sued upon, introduced in evidence on the trial a certified copy of the records of the board of supervisors of Stark county, as follows, to wit: "Ordered that the chairman of the board of super-"visors be, and he is hereby, authorized to subscribe "$500,000 to the capital stock of the Western Air-line "Railroad, and that the clerk be authorized to issue to "said company fifty thousand dollars of Stark county "bonds, payable in twenty years from the date hereof, "etc., *which said bonds and coupons shall be signed by the* "*chairman of this board, and attested by the clerk, with the* "*seal of the county attached*"; which bonds and coupons were issued, and signed and sealed by the chairman and clerk as ordered.

Had the plaintiff, George O. Marcy, introduced in evidence on the trial of this case, a certified copy from the records of the corporate authorities of the town of Ohio, of an order, made by them, directing the issue of said bonds and coupons, and that the same be signed by the supervisor and town clerk of said town, then said bonds and coupons would have appeared to have been issued by competent authority; but no such order having been shown, and the bonds and coupons having omitted to recite any such order or authority, they are void upon their face, and have no validity whatever—they purport-

ing to have been issued and signed by the supervisor and town clerk, and by them alone.

But, says the counsel, as these bonds and coupons recite "that the said township of Ohio has caused these presents to be signed by the supervisor and town clerk of said township, it is equivalent to saying, that they were issued by the proper persons."

This is not so, for three reasons:

1st. That by the recitation aforesaid, the supervisor and town clerk profess to bind the township of Ohio *solely on their own authority.* They do not profess to have acted therein on the authority or by the direction of the corporate authorities of the town, or township, or in pursuance of any authority conferred upon them by any order of the corporate authorities of said town.

2d. The supervisor and town clerk had no authority whatever to execute instruments of writing to bind a town or township. It is not the way, or mode, or manner which the law provides, for towns to execute written instruments. They, the supervisor and town clerk, are not the corporate authorities of the town or township, and have no authority to execute instruments of writing for them. I do not deny but what the corporate authorities could have ordered or directed the supervisor and town clerk to execute the bonds and coupons; but they gave no such order, or direction, and it is not insisted that any such was given, nor was it recited in the bonds or coupons that any such had been conferred. If such had been, it would have been necessary for the

plaintiff to have proved it upon the trial, in order to establish the authority of the supervisor and town clerk to issue the bonds and coupons sued upon. Not having produced such authority, the bonds and coupons were without authority.

3d. The township of Ohio is not an incorporated body, and the supervisor and clerk had no authority to do business in that name or style, as the law requires all acts and proceedings to have been done in the name of the town of Ohio. Consequently the act of the supervisor and town clerk, in attempting to act for and bind the township of Ohio, is a nullity; because if they had any authority at all, it was to act for and bind the *town of Ohio*, and not having professed so to do, the town is not so bound.

If the position of counsel for the defendant in error be correct, it was only necessary for the bonds and coupons to purport to have been issued and signed for the town of Ohio in order to bind the town, although said bonds were issued and signed by one having no authority whatever, in fact or law, to issue or sign bonds or coupons, or any other paper for the town: That they might have been as well issued and signed by an overseer of the poor or road overseer, or indeed by any one who assumed to bind the town, and the town would thereby be absolutely bound: Although in fact and law there was no such authority whatever, and the town had, as in this case, filed the general issue with an affidavit attached verifying its truth, and wholly denying the authority of the officer or officers by whom the same purport to have

been issued and signed in behalf of the town. The folly and absurdity of such a position can not be made more manifest by any further illustration, and I leave it.

2d. The counsel for defendant in error next insists, That although the act of March 25, 1869, expressly provides "that the corporate authorities of said city, town, "or township, *and* the supervisor and town clerk of said "township so voting, shall cause said subscription to be "made, and upon its acceptance by the directors of said "company, *shall cause bonds to be issued in conformity of* "*said vote.*"

That the law does not mean that, but that *and* means *or*; or in other words, in order to fasten a purported debt of $40,000 on the town of Ohio, to which its proper authorities never consented, and which was the creation of a dishonest supervisor, acting in complicity with this railway company, courts will, in order to favor and sustain railroad paper, substitute the word "or" for the word "and," used in said act. That towns and the people have no rights to be respected by railroads, the counsel must really believe, or he would not propose that this court should thus change said act, in order to sustain the bonds and coupons in question.

What authority has this or any court to make a total change in a legislative act, by striking therefrom one word and inserting another of opposite meaning?

Counsel, in support thereof, cites Parsons on Contracts, as though a work on contracts would shed light upon a legislative enactment, or confer authority upon courts

to disregard the same. The other authority he cites is Ex parte Bolig, 31 Ill., 94, in which the Supreme Court of this State did not decide that "and" ever did or could mean "or," but that, in that case, by the use of a semicolon, and the word "and" used improperly, they made a bad sentence, and that by the omission of them the sentence was made intelligible, and expressed the sense of the legislature. In the act of March 25, 1869, there is no improper punctuation or bad sentence—none such is claimed by the counsel; then how can said decision be in point? So his other authority, Parsons on Contracts, is likewise inapplicable. Counsel says that the use of the word "and," instead of "or," would require the supervisor and town clerk of some township to unite with the authorities of a city, etc. I had replied to and refuted this position in my first argument, to which counsel has made no reply, but has simply recited his point. I shall not discuss this point again, but simply refer to pages 29 and 30 of my previous argument.

Counsel claims that they are no corporate authorities of a township. I replied to that point in my first argument (which counsel has failed to notice,) by quoting from Art. 9, Sec. 5, of the Constitution of 1848, of the State of Illinois: "*The corporate authorities* of counties, "*townships*, school districts, cities, towns, and villages, "may be vested with power to assess and collect taxes "for corporate purposes."

The Constitution of the State of Illinois says that both towns and townships had corporate authorities, and they alone could levy taxes. Counsel says otherwise.

Whose assertion is to govern this court, counsel's or the Constitution of this State?

Then counsel insists that if a township had corporate authorities, they are the supervisor and town clerk, because "they are elected by the people, and are the most prominent and responsible authorities of the town." Then the President and Secretary of State are the government of the United States, or the corporate authorities thereof; the Governor and Secretary of State the government of Illinois, because three of the four are elected by the people, and are the most prominent and responsible officers of the State and nation respectively, But he says the use of the word "and" would convey the idea that the corporate authorities are a separate body, and that the supervisor and town clerk do not necessarily belong to them. I had replied to this in my first argument, which counsel has failed to notice, that the supervisor and town clerk are not necessarily a part of the corporate authorities of a town or township. They are not indispensable to the constitution of the board of auditors, who are the corporate authorities of the town or township. They can attend if they like, and constitute a part of said board; but if they do not so attend, such board is constituted without them. But if there were such apparent partial inconsistency as contended for by counsel, yet as the law is plain, the words employed therein not being donbtful or ambiguous, courts must construe and enforce the law as they find it, and not as the counsel would like it.

Counsel further contends that the employment of the

word "and" is senseless, and he desires to have inserted in the act the words "as the case may be." The reply to this is, the legislature of the State of Illinois appeared to have thought otherwise, or they would not have inserted in the act the word "and," which is so offensive to the counsel, and omitted his favorite expression, "as the case may be."

Also, he contends as the act does name the supervisor and town clerk, and does not name the other officers who constitute the corporate authorities by name, and require them to issue the bonds and coupons, that therefore, although the act says that the corporate authorities of the township as well as supervisor and town clerk shall issue the bonds and coupons, it means that the latter alone shall issue them.

I ask again in reply, if the act designed that the supervisor and town clerk should alone act therein, why expressly require the corporate authorities also to act therein? The township organization law then in force had clearly defined what officers constituted the town auditors or corporate authorities of the town or township, and where was the necessity for reciting said law in this act?

Counsel seeks to expunge the words corporate authorities from the act, because the act did not define who constituted such authorities, when the general township organization law of this State then in force had clearly designated what officers constituted such corporate authorities. What possible reason or common sense warrant such an attack upon a legislative act?

Counsel claims that the purported debt of these bonds and coupons were not created by the supervisor and town clerk, but by a vote of the people of the town. The counsel has failed to notice the cases of People *v.* Tazewell Co., 22 Ills., 154–5–6, and Aspinwall *v.* The Commissioners of the County of Davis, 22 Howard, 364, cited in my first argument, which hold that a vote in favor of subscription *creates no obligation on the part of the town to subscribe*; that until the subscription be actually made, no obligation existed on either party; *that it was the subscription that created the debt*, not the vote to subscribe. The latter being only the power of attorney given to subscribe, counsel might as well contend that the execution of power of attorney to make a deed was equivalent to the execution of the deed itself.

I do not contend that the supervisor and town clerk could not be delegated to execute these bonds and coupons by the corporate authorities of the town, but I do insist that the legislature of the State of Illinois could not delegate to the supervisor and town clerk the authority to issue said bonds and coupons by a vote of a majority of the people of said town, because, as decided by Supreme Court of Illinois, the 5th section of article 9 of the Constitution of Illinois, adopted in 1848, forbids the legislature to grant the power of local or corporate taxation to any other persons than the local or corporate authorities, and the power to create a debt to be discharged by the levy of a tax is the same.

Howard et al. *v.* St. Clair Co. Drain Co., 51 Ills., 51.

Livingston *v.* Wilder, 53 Ills., 305.
People *v.* Mayer, 51 Ills., 31.

The case of People ex. rel. *v.* Solomon, 5 Ills., 50, cited by counsel for plaintiff in error, is not in conflict therewith as supposed by counsel. The Court, in the last mentioned case, holds that the legislature can create corporate authorities for different departments of a city or town government, and that it is not necessary that one set of corporate authorities should administer all the departments of a city or town government. So I concede that in case of towns or townships, one set of corporate authorities could have charge of the roads of a town, another of the schools of a town, etc. But the legislature could not authorize a part of the corporate authorities that have charge of roads, to create a road debt against the town, or a part of the corporate authorities that have charge of schools to create a school debt against the town; nor could the legislature authorize any person or persons other than the corporate authorities of said departments to create a debt or issue bonds or coupons to bind said town — for to do so would be in direct conflict with the Constitution, which inhibits the creation of debts against the town except by the corporate authorities thereof; not a part or minority thereof. The legislature of the State of Illinois had never constituted the supervisors and town clerk corporate authorities for any branch or department for the administration of town affairs. They had no corporate capacity whatever. They could not bring suit in a corporate capacity nor be sued thereby. They were simply officers of the town, with the right,

if they desired, to sit with, and constitute a part of, the board of auditors, the actual corporate authorities of said town. To say that the legislature constituted them to be corporate authorities for the especial purpose of issuing these bonds and coupons, and for no other business, is an absurdity, and in clear violation of the Constitution, as that authority could alone have been conferred upon the regular corporate authorities of the town or of some department of the town administration, who had by law the charge of that class of duties. A vote of a majority of the people of the town *could not abrogate this provision of the Constitution.* The people could not, under this Constitution, create any debt against the town, except by and through the regular corporate authorities of the town. The Constitution inhibits any other way, mode or manner of creating debts against a town.

If the legislature could authorize the supervisors and town clerk to create this debt, then they could have, if they desired, allowed any one also to have done the same, and thus that provision of the Constitution been entirely nullified.

The cases cited by counsel for defendant in error from the Supreme Court of Illinois, holding that Park Commissioners elected to take charge of the parks of Chicago, or Drainage Commissioners elected by the County to take charge of drainage, were the proper authorities to levy taxes, and create debts in their respective departments, show clearly that the construction I contend for is the correct one. Had the legislature passed an act to authorize a *part or minority* of the Park Commissioners

to create a park debt, or a part or minority of the Drainage Commissioners to create a drainage debt, and the Supreme Court of this State had held such acts constitutional, then they would have sustained the position contended for by counsel for defendant in error. But no such decisions have been made or could have been made, as they would have been in direct conflict with the Illinois Constitution.

Further, the people of the town of Ohio, if they had had the power, never did approve of the act of March 25, 1869, by specially electing under said act the supervisor and town clerk to be their corporate authorities to issue the bonds and coupons aforesaid. No such election was ever held under said act, nor does such act provide for any such thing, nor was such act submitted to a vote of the people. The only election for officers ever held was the regular annual election for the election of town officers under the general township organization law of the State: and now, because the people of the town of Ohio at such general election necessarily elected a supervisor and town clerk to discharge the general duties of such offices, counsel for defendant in error gravely insists that the people of the town of Ohio had held an election under said act of March 25, 1869, and elected the supervisor and town clerk their corporate authorities to issue the said bonds and coupons.

Yet still said officers were to be no further corporate authorities, were to have no power to sue or be sued as such, were to exercise no further functions, but according to counsel they were created corporate authorities

for this express purpose, and then the corporation ceased to exist. Cannot counsel see that by this construction the constitutional inhibition against the creation of debts by other than the corporate authorities would be practically nullified?—that the legislature could then authorize any person to create such a debt because a majority of the voters had so voted—thus taking the power from the regular corporate authorities of the town to whom by the Constitution it was confided? The cases counsel cites, of Park Commissioners and Drainage Commissioners, were those of regular corporate authorities, elected by the people to take charge of parks and drainage respectively, not to create a debt and then to expire.

Counsel claims that I have not correctly quoted the opinion of the Supreme Court of Illinois in the Brimfield township case. That opinion is unpublished in the State reports. I quoted from the opinion as the same was published in the newspapers. Counsel says the case is Marshall *v.* Silliman, and he purports to furnish, at the end of his brief, a printed copy of such parts of the decision as relates to the point under discussion. I am willing that this court shall consider his report of the decision to be correct. The court will find, by reference to pages 79–80 of said brief of defendant in error, that I had correctly represented in my first argument said decision on that point, which is as follows, to wit: "The town supervisor and clerk who issued these bonds "do not represent a township, as the board of trustees "represent an incorporated town, or the common coun- "cil represents a city. *The supervisor and clerk are but a*

"*part of the corporate authorities.* They have no power of "taxation, nor power of themselves to bind the town- "ship in any way." (In the above printed copy, by mistake of the printer, the word "city" is used for township, in the fourth from the last word, but township was the word employed.)

This opinion of the court does then assert the doctrine for which I contend, that the supervisor and town clerk are but part of the corporate authorities of a township, and have no power of themselves to bind a township in any way.

If they had been the corporate authorities of the township, then a creative act could have been framed in the Brimfield township case, that would have made the bonds and coupons issued by them legal and binding, because the legislature, as the Supreme Court of Illinois had decided, can authorize the corporate authorities to create a debt against the town without a vote of the people; but of course the legislature could not compel the corporate authorities to create such a debt. But in the case of Marshall *v.* Silliman, cited by counsel on page 80 of his brief, the Supreme Court of Illinois held substantially that no curative act could have made the bonds and coupons issued by the supervisor and town clerk of Brimfield township valid, for the reason that they were not the corporate authorities of the township, but only a part thereof, and had no authority of themselves to bind the township in any way—that they are not elected for any such purpose. So in the case now before the court, the supervisor and town clerk were elected for no such

purpose. The election to authorize subscription to the railway company was held on the 21st August, 1869. The supervisor and town clerk who issued these bonds and coupons were elected at the general election in April 1870. When they were elected, the railway company had not signified their acceptance of the town's proposition to subscribe, and did not do so until October, 1870. On the contrary, the railway officers had from time to time declared that they could not build the railway under any such proposed subscription. The town therefore had not then made any subscription, and none was ever made. Can it be reasonably contended then that the supervisor and town clerk who issued said bonds and coupons had been elected by the corporate authorities for that purpose, and especially, too, when their election was wholly independent of any such purpose or intention?

The counsel for defendant in error claims, that the Brimfield township case shows that the Supreme Court of Illinois held other bonds issued by the supervisor and town clerk to be valid when they had been authorized by a vote of the people. The counsel is not correct—no such question was made or considered in the case; no question was presented as to who were the proper persons to make the subscription and issue the bonds and coupons. *The sole question was as to the validity of the elections in authorizing the issue of the bonds.*

Why does the counsel for defendant in error, on page 51 of his brief, copy in full Sec. 1 of Art. 10, of the township organization law, and omit Sec. 2, which last Section shows that the supervisor and town clerk are not

necessary to constitute the board of auditors of the town or township? Sec. 2 is as follows, to wit:

"In case of the absence of any or either of said officers "(supervisor, town clerk and justices of the peace,) or "their failure to attend any meeting of the board, those "attending may associate with them the collector or "assessor of the town, or both of them in place of any "absentee or absentees, as the case may be, who shall act "for the time being, as members of such board."

The examination of the township organization law will show that the board of auditors *pass upon and allow all claims whatever against the town.* But, says the counsel for the defendant in error, they can only audit claims, not create. As they are the only corporate authorities of the town; as they settle all indebtedness against the town; and *determine all taxes to be raised in the town, and have the fiscal management of the business of the town*, has not the legislature the power to authorize them to create a debt against the town; when authorized by a vote of the people? The supervisor and town clerk have no power to audit or allow any claims against the town.

By Section 5 of the T. O. Law, the board of auditors are to examine and audit all charges and claims against their respective towns. By Section 8, among such charges are "the moneys authorized to be raised by a "vote of the town for any town purpose."

Was not the proposed subscription to the railway company, and the bonds and coupons to be issued to pay the same voted by the town, for town purposes? If not for

town purposes can the same be enforced at all? Could the town be taxed, or a town debt created, except for town purpcses? Certainly not. Then the authority to make that subscription and issue the bonds and coupons to pay for the same, rested solely in the board of auditors. If upon the application of the railway company to have the subscription made and the bonds and coupons issued to the company, (they having signified their acceptance of the town's proposition,) the board of auditors had allowed the same, and ordered the subscription to be made, and the bonds and coupons to issue, would they not thereby have audited such claim? But, says counsel, they could not have issued bonds and coupons. Why not? Where is the law that would prohibit them from issuing to any creditor of the town, a certificate of such indebtedness? The practice has always been otherwise. Town orders or certificates of town indebtedness have usually issued to the creditors of the town, whose claims have been allowed by the board of auditors. But if no such authority existed by the general township organization laws, could not the legislature of the State confer upon them this power, as they have done by the act of March 25, 1869?

The case of Sheboygan Co. *v.* Parker, 3 Wallace, 93 and 96, referred to by counsel, was a case from Wisconsin, a State that has no such constitutional provision as the one here discussed in the Illinois Constitution, or at least none of the kind is alluded to in the statement of the case or the opinion of the court, and the case itself has no application to the question now before the court.

The Supreme Court of Illinois have never decided that the legislature could appoint any person or persons, or officer or officers other than the corporate authorities, to create a debt against any corporation, though voted for by a majority of its voters. The vote makes no debt or even obligation on the town. Until the subscription be made no obligation is incurred or debt created. By the Constitution of Illinois, this can alone be done by the regularly-elected corporate authorities, and more especially this is so in a case like that of the town of Ohio, where the vote was for a *conditional subscription*, and it would require the exercise of judgment to determine whether the conditions had been fulfilled, and the railway company entitled thereby to the bonds and coupons. For the legislature to vest this discretion in any other persons or officers than the regular corporate authorities of the town, is a clear violation of the Constitution, and of the rights of the minority of voters of the town. And in this very case, had not the Constitution been violated, and the conditions of the vote disregarded by the unfaithful supervisor acting in complicity with the railway company, this town would have never been threatened with the crushing load of this railway debt that is sought to be forced upon them herein. The town never subscribed to the stock of the railway company, and *without such subscription, no bonds or coupons could have been lawfully issued at all.* That there had been by the town no ratification of the issue of these bonds and coupons, I plainly showed in my first argument, to which counsel for defendant in error has failed to reply. On this point, I refer the court to pages 30, 31, 32 and

33 of the first printed argument for the plaintiff in error.

2d. Counsel for defendant in error appears to misapprehend the point made in the first argument for plaintiff in error, that as the bonds and coupons purport to be executed for the *township* of Ohio, where there is no such corporation, and they not purporting to be issued for the *town* of Ohio, do not bind the town of Ohio. They are not upon their face the bonds and coupons of the town of Ohio, and upon their face there is no promise on the part of the town of Ohio; and can not, therefore, be negotiable instruments, so as to authorize an assignee to sue upon them in his own name.

To meet this objection, said counsel introduces numerous authorities to prove that extraneous proof may be introduced to show that mistakes had been made in the use of the names or titles of corporations in the execution of contracts, etc., and that in fact such corporations were held responsible therefor. This I do not controvert. But these cases cited were not cases brought upon alleged negotiable instruments by an assignee, and the questions were not whether the action could be sustained in the name of the assignees.

The point I make is this: To constitute a negotiable instrument there must be an absolute promise to pay by a *person or corporation having an actual existence.* Here the promise purports to have been made by a corporation that was not a corporation, and not to have been made by the town of Ohio, the party sued. I claim that upon

the face of the instrument there is no promise to pay by the party sued, and although the instrument might, in connection with other proof, establish an indebtedness against the said town, yet that such bonds and coupons are not the negotiable paper of the town. So, likewise, the coupons sued upon do not purport on their face to be the absolute promises to pay, of either the town or township. They are orders on the supervisor, signed by the town clerk and supervisor, when the supervisor was not the proper officer to pay such coupons, and the supervisor and town clerk not the proper officers to have given such orders. That there was no promise of payment, and, consequently, the coupons were not negotiable instruments upon which an assignee could maintain a suit in his own name.

But, says the counsel for defendant in error, the supervisor is the officer that has custody of such funds, and cites a part of Sec. 1 of Art. 8, of the T. O. Law, that it is the duty of the supervisor to receive and pay over all moneys raised therein, for defraying town charges. Thereby conceding what I have claimed, and he denied in his argument, that this matter of subscribing to the railway company and issuing bonds and coupons were town charges, and consequently, by the township organization law, was placed under the control and direction of the board of auditors of the town, and not of the supervisor and town clerk. But then, why did said counsel not quote the *whole of said Section* 2, of Article 8? Why omit this exception in the section which follows directly after what he quoted about the supervisor having charge of all

funds raised for defraying town charges, to wit, *except those raised for the support of highways and bridges.*

Is not a railway in a town a highway? If not, what is it? This court has decided that railways were improved public highways, and therefore the people could be taxed for their construction and support. Then, according to the township organization law, of which counsel gave a garbled quotation, the supervisor had no charge, and could have none, of the funds that might be raised for to pay these railway bonds and coupons (if any there were), and the supervisor and town clerk could legally have given no such order. An order given on an overseer of the poor, or town constable, or the town pump, would have been equally good and valid, and then again the supervisor was required to pay at the State treasurer's office, at Springfield, Ills., where by law such treasurer and not the supervisor had charge of the funds there, and Springfield was without the town and county in which the supervisor was elected and held his office, and the supervisor had no right or authority to hold any funds at Springfield. Then these coupons were not any promise to pay, and did not purport to be such, but were nullities, and therefore not negotiable instruments, upon which an assignee could maintain suit.

None of the numerous decisions cited by counsel for defendant in error will help him out in his effort to make these purported coupons negotiable instruments. He has piled up decisions merely without reference to whether they apply or not, as the court will see by their examination.

3d. To the point, that there was no demand of payment before suit brought, and the action was, therefore, premature, as the only demand made was at Springfield, where the town had no right to make the bonds and coupons payable, the counsel for defendant in error answers, that since the decision made in the City of Pekin *v.* Reynolds, 31 Ills., 532, in which the Supreme Court of Illinois held, that municipal corporations could not bind themselves to pay at any other place than at their own treasury; laws had been passed allowing municipal corporations to make promises to pay wherever they like, and he cites the acts to amend the interest laws passed in 1857. But in these acts municipal corporations are not included. Said acts have no application whatever to the point in question. They do not include municipal corporations because they are not named therein. The Supreme Court of this State, as early as the case of Madison Co. *v.* Battell, 1 Scam., 69, held, that municipal corporations were not embraced within the terms of the interest statutes of this State. By the interest laws of this State, corporations are not allowed to interpose the defense of usury on any action.

Gross' Stat. of Ills., page 371.

If our interest laws apply to municipal corporations, then counties, towns and townships, and other municipal corporations, could legally contract to pay any rate of interest, and usury could not be pleaded, which, of course, could not be the law. The acts cited by counsel have no reference to where municipal corporations can make their indebtedness payable; as their titles denote

they are only in reference to the payment of interest, and that, too, by private corporations, individuals, etc.

In the case of the City of Pekin *v.* Reynolds, 31 Ills., 532, the Supreme Court of this State say, "*that as States and counties are not named in the statute regulating interest, the inference* is that they were not required to pay interest on their indebtedness." As municipal corporations are not named in the statutes on interest cited by counsel, then, according to the decision of the Illinois Supreme Court, the inference is, *that they are not designed to be included.*

It is not true, as stated by counsel for defendant in error, that since the passage of said acts, it has not been disputed that municipal corporations could make their bonds payable elsewhere than at their municipal treasury. This statement of his is not founded upon fact, and he does not cite and can not cite a single decision looking that way, or purporting to change the rule laid down in the case of the City of Pekin *v.* Reynolds, 31 Ills., 532.

Under the Funding Act of the State, so called, if the treasurer of the State had tax moneys in his hands to pay interest on railroad bonds, it was his duty to pay the same, on the presentation of the bonds or coupons. But there is no authority given in said act, or any other law of the State of Illinois, authorizing municipal corporations to make their indebtedness payable at any other place than their own treasury in the said corporation, consequently no demand was made for the payment of these coupons. The town of Ohio was not in default,

and the suit was brought prematurely. It is not like the case of a note made by an individual payable on demand, for in that case no demand is requsite to require him to pay; he has to hunt up his creditor to pay him; while in the case of a municipal corporation, the creditor has to go to the corporation treasury to make demand of payment, and the corporation is not required or authorized to hunt up their creditors to pay them.

That the town had no money provided to pay is immaterial, because until payment was required no money was necessary. A note payable at sight can not be sued, and suit maintained, without presentation, by proving that the maker had provided no money to meet it. In law the indebtedness of corporations is alone payable on presentation at its proper treasury, and demand made of the proper officer, and without this, like a note payable at sight, a suit can not be maintained without presentation.

4th. Counsel concedes that the counsel for plaintiff in error was correct, that the Supreme Court of this State had held that interest coupons did not bear interest after maturity, without an express contract to that effect. But he claims that this court had decided otherwise, and in support thereof cites three cases, two from Iowa and one from Indiana, in which this court allowed interest upon interest coupons after maturity. But the counsel has failed to note in these cases, that no such question was raised as is presented in the case now before this court. It was not shown or insisted in those cases, as in this case, that under the laws of Indiana or Iowa, as interpreted by the

highest legal tribunals of those States, before the coupons were issued, that interest coupons did not bear interest without an express contract to that effect, and that no such contract had been made in such cases. Upon the contrary, those cases were decided upon the presumption that in these States, the indebtedness of municipal corporations bore interest, the same as that of individuals and private corporations.

But in Illinois the interest laws are otherwise, and as decided by the Illinois Supreme Court, in the cases of the City of Pekin *v.* Reynolds, 31 Ill., 532, and City of Chicago *v.* The People, 56 Ill., 334, municipal corporations are not liable to pay interest, except they expressly contracted to do so.

As in the coupons sued upon there is no contract to pay interest; under the laws of Illinois then in force, as interpreted by the highest judicial tribunal of the State, said coupons do not bear interest, and for this court to sustain a judgment against the town of Ohio for interest on said coupons which they never agreed to pay, would be in conflict with the statutes of Illinois, and the decisions of its highest legal tribunal. If this court should so hold, then the citizens of Illinois can have no rights which the railways of the State, or bondholders, are bound to respect.

There is no statute law in force in the State of Illinois requiring municipal corporations to pay interest in the absence of an express contract to that effect. There is not now, and never has been. The interest laws of 1857,

cited by the counsel, do not so declare. They do not even name in them municipal corporations at all, and therefore do not include them, according to the decisions of the Supreme Court of Illinois, in the cases of

Madison Co. *v.* Bartlett, 1 Scam., 69;
City of Pekin *v.* Reynolds, 31 Ill., 532;
City of Chicago *v.* The People, 56 Ill., 334.

The last case having occurred many years after the passage of the acts of 1857, cited by the counsel for defendant in error.

And even if a legal demand had been made for the payment of the coupons (which there was not) the said coupons would not draw interest, because no such contract was made to pay interest after demand, or to pay interest at all, and without such contract the town is not liable to pay any such interest, or even authorized to do so, and the Supreme Court of this State has never decided otherwise, as intimated by counsel.

Finally, counsel for defendant in error insists, that the points presented are questions of conflict of testimony, and not questions of law, arising upon the facts as found by the court.

But counsel fails to show what question there is presented in the case that involves any conflict of testimony. The court, in the bill of exceptions, after stating all the proofs given, states that the court finds *the foregoing to be the facts and all the facts proved upon the trial.*

The points really insisted upon by the plaintiff in error arise upon the *face of the bonds and coupons* themselves.

As to them there is no dispute whatever, and counsel for defendant in error concedes there is none. What, then, does he mean by his allusion to conflict of testimony? If upon the papers introduced in evidence by the defendant in error in the Circuit Court, with the admitted facts in reference to them, as certified by that court, there was a cause of action, then the judgment of the court below will have to be affirmed in whole or part. But if, upon the contrary, said papers, with the admitted and certified facts in reference thereto, did not entitle the defendant in error to the judgment in his favor as plaintiff in error contends, then the judgment will have to be wholly reversed. The questions presented to this court are wholly questions of law, and there is not one single controverted fact in the whole case, and counsel for defendant in error knows it, and has not discussed any question of conflict of testimony. I am surprised that he should seek to avoid a fair hearing before this court by any such an unfounded and ungenerous pretense.

Counsel evidently fears to have this case come fairly in review before this court. He, in his conclusion to his brief, introduces matter that is untrue and is foreign to the questions in issue, seeking to prejudice this court against the town of Ohio. That the bonds and coupons in question were issued long before the proper time, to prevent their issue from being enjoined; that an effort was made to enjoin them, and failed because of this "smart strategy;" that the supervisor who issued the bonds and coupons was the purchased tool of the railway company; that the railway stock purported to have been

issued to the town was worthless, and never accepted by the town; that the town got no competing railroad as they expected, in consequence of the one in question having been leased for a nominal consideration to its rival for ninety-nine years, and that the town would be almost ruined if this $40,000 and interest be adjudged to be paid by them, do not in the least invoke the sympathies of the counsel for defendant in error, and that all his sympathies are with the bondholders is not remarkable. But that he should seek to prejudice this court against the town by introducing in his brief foreign matter, is somewhat unusual. I shall not emulate his example, but only say, in conclusion, that I only ask that this town, (though a feeble contestant with railway bondholders backed by millions of capital) shall have an impartial hearing before this court, and if the decision be against her, I can only say that Allah, or the bondholder, is great, and that almost any instrument that has the "form of railway bond or coupon can be enforced although issued without authority."

MILTON T. PETERS AND
JOHN B. HAWLEY,
Att'ys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

THE TOWN OF OHIO,
Plaintiff in Error,
v.
GEORGE O. MARCY,
Defendant in Error.

Error to the Circuit Court of U. S. for Northern District of Illinois.

Brief and Argument for Defendant in Error, by George O. Ide.

PADDOCK & IDE,
ATTORNEYS FOR DEFENDANT IN ERROR.

CHICAGO:
BULLETIN PRINTING COMPANY, LAW PRINTERS, MONROE STREET, CORNER CLARK.
1873.

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BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR, GEORGE O. MARCY.

May it please your Honors.

The municipal bonds, whose validity is attacked by the plaintiff in error in this case, were issued to the Illinois Grand Trunk Railway, a railroad corporation in the State of Illinois, under and by virtue of an act of the legislature of Illinois, in force March 25, 1869. This act is set forth at large in the record. There can be no question in this case as to the existence of a law authorizing the creation of these bonds. The bonds were issued by the plaintiff in error after the law took effect, and in pursuance of an election duly called and held in the town of

Ohio, on the 21st day of August, 1869, at which a large majority of all the voters living in the township voted in favor of this subscription; the record of the vote being 125 votes for and only 13 against the project. As a matter of fact, the conditions which were attached to the vote, were substantially complied with on the part of the railroad; the railroad was built, and the cars running thereon through the town of Ohio on the old grade, at or about the time of the delivery of the bonds; the people of the town received the consideration of their vote, viz: the construction of the road through their township, the location of a depot as they had desired, and the facilities and accommodation of railroad communication. The bonds and the coupons attached, were delivered by the agents of the town to the railroad company on January 6th, 1871, and passed in open market in the usual course of trade through the hands of bona fide purchasers for value, until they became the property of Geo. O. Marcy, the defendant in error, who as the Circuit court found upon the evidence, was a purchaser for value of these papers before any of them became due, and without notice of any of the alleged defects, irregularities or equities now set up by the plaintiff in error.

The bonds, so issued, recited upon their face that they were issued under and by virtue of the charter of the Illinois Grand Trunk Railway and the law above referred to, amending said charter, and other laws of the state of Illinois, and in accordance with the vote of the electors of said township at the special election, held August 21st, 1869, in accordance with said charter and amendment and laws.

No action or suit was ever brought by the plaintiff in error to restrain the delivery of these papers. The town, through its principal officer, the Supervisor, received in exchange for its bonds from the railroad company, a certificate of stock in that company to the full amount of the subscription voted, and has ever since retained that certificate, and has never at any time offered to return it.

Under this state of facts, without ever having taken any steps to prevent the issuing of these bonds and coupons, after receiving the consideration promised, and after the lapse of over

eighteen months from the delivery of the bonds, the plaintiff in error for the first time objects to a recovery upon the coupons sued on in this action, for reasons which are more technical than equitable in their character.

We proceed to consider the points made by the counsel for the plaintiff in error, premising, however, that the abstract in his brief is in some respects inaccurate and incomplete in particulars which we shall hereafter point out.

I.

The plaintiff in error assumes that the authority to issue the bonds and coupons was derived from the election of August 21st, 1869, and that if the election was illegal no authority was conferred. The answer to this, in the first place is, that the grant of power, the authority, was conferred by the act of the legislature of March 25, 1869, and that the election was "a condition annexed to the grant of the power." The act of March 25, 1869, gave express authority to issue the bonds and coupons in question, to the "Illinois Grand Trunk Railway," the payee named in them.

That an election, under such a law, is treated as but a "condition annexed to the grant of power," we understand to be the uniform doctrine of this court, in relation to municipal bonds.

Knox Co. v. Aspinwall, 21 Howard, p. 544, 545.
Moran, et al., v. Com'rs Miami Co., 2 Black. 724.
Rogers v. City of Burlington, 3 Wallace 654.
Larned v. Burlington, 4 Wallace 275.
Supervisors v. Schenk, 5 Wallace 777.
Pendleton County v. Amry, 13 Wallace 297–305.
City of Lexington v. Butler, 14 Wallace, 283.
Grand Chute v. Winegar, 15 Wallace 360, 365, 372.

That the town or township of Ohio is a municipal corporation embraced within the terms of the act of March 25, 1869, is fully shown by the evidence identifying it. The proofs re-

cited in the bill of exceptions show that the town of Ohio is a municipal corporation, created under the township organization system of the State of Illinois, and had been such since the year 1850; that its territorial limits were the same as congressional township 18 N., R. 9, E. of the 4th P. M.; that its locality is in Bureau county, Illinois, about twelve miles west of the city of Mendota, in La Salle county, and that "the route of the Illinois Grand Trunk Railway, west of the city of Mendota, via Prophetstown to the Mississippi river," mentioned in the act ran at the time of the passage of the act and at the time of the election, and now runs directly through said town. This corporation was thus identified as one of the classes of municipal corporations referred to in the act. And that such a municipal corporation, though not named in the act, may be thus identified, has been settled by this court.

Curtis v. County of Butler, 24 Howard, 435–439.
Woods v. Lawrence County, 1 Black., 407.

If then, as the above cited authorities hold, the authority to issue these bonds and coupons is to be found in the law of March 25, 1869, and the election is but a condition annexed to this grant of power, it would seem to follow under the decisions of this court, that in a case like this it matters not to a bona fide purchaser whether there was any election at all, nor whether the election that was held was conducted in an irregular manner, when the bonds recite on their face that they were issued in accordance with the law authorizing their issue. The bonds in question contain recitals, that they were issued in accordance with the laws of Illinois, the act of March 25, 1869, and the vote of the electors of this town. Under these recitals. Marcy, the defendant in error, who is such an innocent purchaser in good faith, was not bound to look further than the face of the bond and this act of March 25, 1869. Hence all questions concerning the "conditions annexed to the grant of power," the validity of the election, the conduct of the election, irregularities in the manner of holding it, and whether or not the whole or only a part of the railroad was completed, when

the bonds were actually delivered, are not the proper subjects of inquiry here. The recitals in the bonds, coupled with that other estoppel of the receipt and retention by the town of the certificate of stock issued to it, as appears in the record, operate to protect the defendant in error, under the oft-repeated decisions of this court. These propositions are fully sustained by the following authorities:

Knox Co. v. Aspinwall, 21 Howard, 539, 545.
Bissel v. City of Jeffersonville, 24 Howard, 288, 299.
Mercer Co. v. Hacket, 1 Wallace, 83, 93, 94.
Gelpcke v. City of Dubuque, 1 Wallace, 203.
Van Hostrup v. Madison City, 1 Wallace, 291.
Supervisors v. Schenck, 5 Wallace, 780, 784.

"Where the votes of 326 citizens were given in favor of a municipal loan, and of five only against it, and the city issued the bonds, no one interposing to prevent the issue, all parties acting in good faith, the city cannot afterwards object to the regularity of the preliminary proceedings, and set up that *the vote was not taken in the form in which, under the charter, it ought to have been taken.* If the legal authority under which the agents of the city, in issuing the bonds, acted, was sufficiently comprehensive, a holder of them, *bona fide* and for value, has a right to presume that all precedent necessary requirements had been complied with."

Meyer v. City of Muscatine, 1 Wallace, 385.

In *Pendleton County v. Amry*, 13 Wallace, 299, 305, 306, a case in which it was pleaded that *no election* at all was held, and where no recitals in the bonds appeared in the pleadings, it was held that the exchange of the bonds by the county for a stock certificate, and retaining it, operated to estop the county from questioning that the condition of an election had not been fulfilled, and that the plea averring no election was bad on demurrer.

"The repeated decisions of this court have established the "rule that when a corporation has power, under any circum-"stances, to issue negotiable securities, the *bona fide* holder has

"a right to presume that they were issued under the circum-
"stances which gave the requisite authority, and that they are
"no more liable to be impeached for any infirmity in the hands
"of such a holder than any other commercial paper."

City of Lexington v. Butler, 14 Wallace 290, 296.

In the case of the *Town of Grand Chute v. Winegar*, 15 Wallace 360, 365, 371, 372, in which it was specially pleaded "that no special election, such as the act prescribed, had been called or held, previous to the issue of the bonds," when the act of the legislature prohibited the issuing of any bonds until such an election was had, the bonds were held valid, and the plaintiff entitled to recover, on the same grounds as set forth in the preceding cases.

Under the circumstances of this case at bar, in which appear all these estoppels on the plaintiff in error, both of recitals in the bond and the receipt and continued retention of the certificate of stock, of what avail can it be set up, as a reason why these bonds should be declared invalid, that a petition for the election was not formally addressed in terms to the town clerk—a mere informality, if anything—when, as in the case in 21 Howard, 539, 543, and 5 Wallace, 772, 784, informalities, in the notices of the election and omissions to give them from the right source, or, as in the case in 1 Wallace, 385, a failure to take the vote in the form required by law, or as in 1 Wallace, 85, issuing bonds without any recommendation of the grand jury as the statute required, could not affect the bona fide holder? Of what avail, too, can it be to object that only legal voters, and not unnaturalized foreigners—a statement however not sustained by the record—were permitted to vote, when, as in the case in 21 Howard, 547, the fact that less than the requisite majority of votes was polled, could not affect the bona fide holder, or, as in the case in 1 Wallace, 291, 297, evidence that the requirement of a "petition of two-thirds of the citizens" had not been complied with, proved equally futile? And of what avail, also, can it be for the plaintiff to urge, that this election in Ohio township was presided over by three judges, the usual election board, and

not by a moderator in town meeting fashion,—a mere irregularity in conducting an election—when the cases cited above from 13 Wallace, 299, and 15 Wallace, 360, hold, that the allegation of "no election at all" will not overcome such estoppels as exist in this case?

Of much less gravity and importance are the alleged defects in this case, if indeed they exist at all, than those which occurred in the cases cited above. In this case, proceedings preliminary to the issuing of the bonds were had in substantial compliance with the act of March 25, 1869; an application in writing, in the form required by the act, and signed by more than the requisite number of voters, was presented to the clerk of the township, and by him received and filed in his office; notices or a call for an election under this application, were given by the clerk in the manner and for the full period of time required by the law; an election was held in said township at the time and place named in the notices, on the 21st day of August, 1869, upon the propositions submitted in the application and notices; at this election a large majority, not only of the voters present at the election, but of all the voters living in the township, voted for the subscription to this railroad. The authority of the officers, who afterwards issued the bonds, was thus conferred by a large majority vote of the people of this town, at a regularly called election, held for the purpose.

If, however, we look into the facts as proved in the Circuit court, it will be seen that some of the objections to the election, taken by the plaintiff in error, are not well founded.

First Objection: That the petition to call the election was *addressed* to no one, when the law required that the same should be addressed to the town clerk.

This objection means that a mere informality, in omitting to preface a petition with a formal address to the person, to whom the petition is presented, invalidates all the proceedings. According to this, mere form is more precious than substance.

According to this, a failure to observe an unessential formality will invalidate an election, and defeat the will of the electors, whereas the the contrary is the legal rule. But, in fact, the law referred to, does not require the application of the voters to be formally *addressed* to the town clerk. It is but an assumption of counsel for plaintiff in error. There is no such language in the law. The words of the act are, "upon application of any ten voters," etc, but there is no requirement as to the form of the application, nor its address, nor is there any comandment that it must be in writing even. That there was an application, and that it was made to the town clerk, and by him filed in his office, and acted upon, is an undisputed fact in the record.

Even if the objection were true in fact, its immateriality even in a direct proceeding, is illustrated by analogy in a common law *certiorari* case, found in *Commissioners of Highways v. Supervisors*, 53 Illinois, R. page 321, in which, under the Illinois statute, concerning appeals from laying out roads, a summary proceeding, and requiring, in express terms, "the appeal shall be *addressed* to the town clerk of the town wherein the road in question shall be,"—1 Gross' Illinois Statutes, page 774, Sec. 76, it was held by the Illinois Supreme court, as follows: "It is true the paper is informal. This paper complies with all the requirements of the act, except that it is not formally addressed to the town clerk. But we do not deem it essential that the paper, intended as an appeal, shall be thus formally addressed. It contains all the necessary substance, and, as already remarked, in such proceedings, we are not inclined to be tenacious about forms."

SECOND OBJECTION: That at the election only legal voters were permitted to vote, while by the law all the adult male inhabitants, whether foreigners or citizens, were entitled to vote.

This objection also is not true in fact, as appears by the

record. There is no evidence, nor any finding in the record, that any person entitled to vote under the law of March 25, 1869, was refused a vote. Even if foreigners were entitled to vote, there is no proof that the votes of such were rejected. The plaintiff's counsel, in his Abstract, states that only legal voters were allowed to vote, but the record contains no such proof. We presume that the counsel infers this from the election notice given by the town clerk to the "qualified voters of said Township," and from the expression used in the application to the town clerk, to-wit: "And your petitioners hereby ask that due notice shall be given, according to law, submitting the following proposition to the legal voters of said town," etc., copies of which notice and application are set forth in the record. But all this is very far from showing that at the election the ballots of voters qualified by this law to vote were refused.

If the counsel means that by the term "qualified voters" used in the election notice, "inhabitants" generally of the township were not invited to participate in the election, we answer, first, that if under this act mere "inhabitants," without reference to other qualifications, were entitled to vote, then the term "qualified voters" in the election notice necessarily meant and comprehended, and did not exclude inhabitants. The statute prescribes no form for the election notice. The phrase "qualified voters" includes "inhabitants," if, in fact, all the inhabitants were entitled to vote, because, in such case, the inhabitants would be *qualified voters* under this act. Hence the clerk, in his election notice, did not exclude inhabitants, if they were in fact qualified to vote. And, in the second place, we answer, that the term "inhabitants" as used in this act means "legal voters," and not citizens, foreigners, men, women and children indiscriminately. The purview of the act requires this construction. It speaks of an election to be held, of an application to be made by *ten voters*, not ten inhabitants. It is true the act speaks of submitting the proposition to the inhabitants of the township, but it also requires an election to be called "in the same manner that other elections for said town-

ship are called." No other elections are called in any other manner than by notice to the legal or qualified voters of the township.

We are not without judicial authority in support of this construction.

The Supreme court of Illinois, in *Beverly v. Sabin*, 20 Illinois 361–362, in construing a section of the school law of that State authorizing the levy of a tax, which read, "*Provided*, that the *people vote the same* as hereinafter expressed," held as follows: "Some criticism has been made because the word *people* instead of the word *voters* is used. We cannot doubt that this word, as here used, means *voters*, or the people *who are entitled to vote* in the district."

In the case of *Dunnavan v. Green*, decided by the Supreme court of Illinois, at September term, 1871, 57 Ill. 63, 67, that court construed similar language, occurring in a railroad act, in like manner. The language used in that act was identical with the language used in the law under consideration. It provided for the submission of the proposition for subscription to the *inhabitants* of the township, for a call for an election by the township clerk, and if a majority of said votes should be for subscription, that bonds should issue. The court treated the word inhabitants as equivalent to voters, saying:

"It is next insisted that a majority of all the voters resid-
"ing in the township did not vote in favor of issuing those bonds.
"The act, we have seen, provides for calling the election, and
"declares that if a majority of the votes shall be for subscrip-
"tion, then the county, city, town or township shall cause the
"subscription to be made and the bonds to be issued. This pro-
"vision evidently refers to the majority of the votes cast at that
"election, and not to the *majority of the legal voters* residing in
"the township. If such had been the intention, other and very
"different language would have been employed. We are clearly
"of the opinion that a fair, and the only reasonable construction
"that can be given to this act is, that a majority of the votes
"cast at the election is sufficient."

It was an *election* that was to be held. The constitution of Illinois of 1848, art. 6, sec. 1, in force at this time, prescribed that voters at *all elections* in Illinois, should be white male citizens, above the age of 21 years, and resident in the state one year preceding the election; white male *inhabitants* only were included, who resided in the state prior to the adoption of that constitution.

Con. of Illinois, art. 6, sec. 1, 1 Gross' Stat., p. 35.

This provision of the constitution being paramount, applies to all elections, whether held for general or special purposes. And, inasmuch as it is an *election* that is to be held under the act of March 25, 1869, and the notice of it is to be given in the "manner prescribed by law," that is, by some general law, either the general election or the township law, it does not matter which, and, inasmuch as those laws never contemplated that notice should be given to any but *legal voters*, it follows that an election notice addressed to the legal or qualified voters of the town must be valid, and excludes the idea that the legislature intended, in this instance, to enlarge the elective franchise and to permit the inhabitants of this town to vote, irrespective of age, sex or other qualifications.

Under the township organization laws of Illinois, no person is entitled to vote at any town meeting, unless he is qualified to vote at general elections.

T. O. Law, art. 5, sec. 9, 1 Gross' Statutes, p. 747.

In *South School District v. Blakeslee*, 13 Connecticut, 227, 234, where a school election notice was addressed to the *legal voters* and not to the inhabitants, it was held that the form of the notice was immaterial, and that it was sufficient if the inhabitants of the school district might understand from it the purpose for which they were to be convened.

In *Baldwin v. Town of North Branford*, 32 Connecticut, p. 48, it was held to be "not necessary that a notice or warning of a town meeting should be addressed to any persons. The notice of a town meeting addressed 'to the inhabitants of a town,'

is not invalid by reason of the fact that there may be many of the inhabitants who are not voters. The notice is good as to such of them as are voters. Besides, the term 'inhabitants,' as used in such a connection, in the statute, in common parlance, and in the forms immemorially used, *imports those who are qualified to vote in town meeting.*"

COOLEY ON CONSTITUTIONAL LIMITATIONS, p. 600, says that, the terms "inhabitants," "citizens," and "residents," as employed to designate voters, mean substantially the same thing.

THIRD OBJECTION: "That the vote was to subscribe stock to the Illinois Grand Trunk Railway *Company*, while the subscription was to the Ill. G. T. Railway—a corporation of a different name."

There is no foundation in fact, in the record for this objection also. Where does the counsel get his authority for this statement? An examination of the evidence, the bill of exceptions, will demonstrate that this objection is not founded on the facts of the case.

1. The town record of this election—which appears in the bill of exceptions—specifically states, that,

"At a special town meeting and election held in the town "of Ohio, in the county of Bureau, and State of Illinois, at "the town hall in said township, on the 21st day of August, "A. D. 1869, the meeting was called to order by J. W. Forney, "town clerk, at 9 o'clock A. M. * * * The polls for the "election *to vote for or against subscription to the stock of* THE "ILLINOIS GRAND TRUNK RAILWAY were thereupon opened. "* * * The following is a statement of the result of the "canvass of votes by ballot, for and against *the subscribing "four hundred shares, of one hundred dollars each, to the capi-"tal stock of* THE ILLINOIS GRAND TRUNK RAILWAY, at said "special town meeting and election, as publicly canvassed by

"the judges and clerks of election thereof; one hundred and "twenty-five votes were cast for said subscription and thirteen "votes were cast against said subscription. On motion ad- "journed without day.

Attest: "J. W. FORNEY,
"Town Clerk."

2. The poll book, tally list, and certificate of this election—which also appear in full in the bill of exceptions—made on the day of the election, also inform us unequivocally that this election was held at the town hall in Ohio Town on the 21st day of August, 1869, "for the purpose of voting for or against subscribing to the capital stock of the ILLINOIS GRAND TRUNK RAILWAY, to the amount of four hundred shares of one hundred dollars each," without the addition of the word *Company*, or any other word that might give rise to the faintest suspicion that some other railroad than the one named in the act of March 25, 1869, was intended.

3. The notice of the election, also set out at large in the record, informed the voters and informs us —

"That by virtue of the act approved March 25, 1869, this is to give notice that on the 21st day of August, A. D. 1869, an election will be held at the town hall in the township of Ohio, Bureau county, and State of Illinois, for the qualified voters of said township, to vote for or against the proposition of subscribing to the capital stock of the ILLINOIS GRAND TRUNK RAILWAY *as provided in the act approved March* 25, 1869."

4. In the documentary evidence referred to above, the word *Company* is not used at all. It does appear in the application, but in such a connection as to show the absurdity of the objection that the vote was to subscribe stock to a different corporation than the Illinois Grand Trunk Railway. The application, set out at large in the bill of exceptions, reads —

"The undersigned, legal voters of the town of Ohio, County of Bureau, State of Illinois, hereby make application for the calling of an election in said town in accordance with *an*

act of the legislature of the State of Illinois, approved March 25, 1869, providing for subscription to the capital stock of the Illinois Grand Trunk Railway Company, etc.," * * * states the proposition, "to subscribe 400 shares of $100 each to the capital stock of said Company and to issue bonds, etc." * * * and concludes, "on condition that the aforesaid Grand Trunk RAILWAY shall be completed and the cars running thereon for the purpose of carrying passengers and freight from Mendota through the town of Ohio on the old grade, etc."

In the above the word Company is used as merely descriptive. It was simply superfluous. What corporation was meant and referred to is clearly indicated by the reference to the act of March 25, 1869, amending the charter of the Illinois Grand Trunk Railway. The application distinctly asks for an election under that law and no other. The Illinois Grand Trunk Railway is the corporation named in that act, and hence the application means that corporation and no other. The application refers to the Illinois Grank Trunk Railway, with the suffix "Company" in one place and in another without it. The allusions to the old grade, old Ill. G. T. R. R. Co., contained in the application, taken in connection with the power given in the charter of the Illinois Grand Trunk Railway to purchase this old grade, also show that the vote and the application both refer to the same corporation. Besides all this, there is no evidence whatever that there ever was any corporation in the State of Illinois known by the name of the Illinois Grank Trunk Railway Company, different and distinct from the Illinois Grand Trunk Railway.

The objection, then, in point of fact, amounts to nothing, and in point of law, a mere mis-nomer or addition of a superfluous word to a corporate name is immaterial, and affects no right, for it is held in Illinois, and perhaps in all courts, "that it is a settled principle that the addition to, transposition, interpolation, omission or alteration of some of the words in the name of a corporation, consisting of several words, is immaterial, if it is evident what corporation is meant."

Board of Education v. Greenbaum, 39 Illinois 614.
Angell and Ames on Corp. Sec. 99.

Thus, a contract with a corporation, under the style of "The State Board of Education of Illinois," was held to be valid and binding though the true corporate name was "The Board of Education of the State of Illinois,"—39 Illinois 613. So, a subscription to a railroad, by the name of "The Wabash *Valley* Railroad Company," when its true corporate name was "The Wabash Railroad Company," was decided to be valid, the court holding that a mis-nomer or apparent variance could be explained in pleading by averment and avoided by the proof. *Peake v. Wabash R. R. Co.*, 18 Illinois 90. So, in a devise to a corporation, though the name be entirely mistaken, if the words show that the testators could only mean a particular corporation, it is sufficient, as for instance a devise to the inhabitants of the *South* Parish may be enjoyed by the inhabitants of the *First* Parish, "the First Parish," being the legal name.

First Parish v. Cole, 3 Pickering 237.
Chadsey v. McCreery, 27 Illinois 255.

So, in a suit against an insurance company by the name of the "Insurance Company of North America," in which it was alleged that the policy was made in that name, when the proof showed that it was made by "The President and Directors of the Insurance Company of North America," the true corporate name; the court held that the legal effect was the same, whether it was said the company made the contract or that it was made by the president and directors of the company; that both meant the same thing.

Ins. Co. of N. A. v. McDowell, 50 Ill. 130.

So, in New Hampshire, it was held in a suit upon a promissory note given to "The President and Directors of the Newport Mechanics' Manufacturing Company," instead of to "The Newport Mechanics' Manufacturing Company," which latter was the true name of the corporation to which the note was designed

to be given, that the variance was not such as to preclude a recovery in the name of the corporation.

Newport Mechanics' Manufacturing Company, v. Starbird, 10 New Hampshire, 123.

It is a familiar principle, when a deed is made to a corporation by a name varying from the true name, that the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them, by the name mentioned in the deed.

Board of Education v. Greenbaum, 39 Illinois 614.
African Society v. Varick, 13 Johnson 38.

The misdescription of the corporate or politic name of the plaintiffs in the bond, by calling them "The United States of NORTH America," instead of America, is cured by the averments of identity in the declaration.

United States v. Bradley, 10 Peters 344.

If the object in making this objection was to convey the impression that this case falls within the rule of *Marsh v. Fulton Co.*, 10 Wallace 676; that the vote was to one railroad corporation, while the subscription was made to an entirely different corporation, we have to say that the facts in the record completely refute the statement.

THE FOURTH OBJECTION to the election is, that it was invalid, because the usual election board presided at the polls, instead of a moderator.

This is, in effect, an allegation that an election is rendered invalid by errors or irregularities in the mode of holding or conducting it, after it has been properly called; that the manner and conduct of the election are the power itself, and not the mere exercise under the power; that the defective execution of the power makes the vote void, and not voidable only, whereas the authorities in Illinois are to the contrary. In this case it is admitted that there was a law authorizing this election, that the

proceedings preliminary to the election required by the law were had, viz., an application to the town clerk to call the election, from the requisite number of voters, a call for the election and notices of it given by the proper officer, in the manner and for the period of time required; that the election was held at the time and place fixed, a free and untrammeled expression of the will of the voters obtained, and the result of the election recorded by the town upon its records. And the only objection urged is that those who presided at the election were the officers,—the statutory board of election—who preside at all other elections held in the town, except mere town meetings for the transaction of ordinary town business, at which the presiding officer is called a moderator. If there be anything in this objection, we hold that it was but an irregularity in the conduct of the election, a mere defect in exercising the power, of such a character as only to render the election voidable in a direct proceeding before bonds have issued, and that it cannot collaterally invalidate bonds, after they have been issued and passed into the hands of innocent purchasers. When the application was made, and the town clerk gave notice of the election, the power to hold the election had been invoked, and put in action.

The People ex rel. v. Garnier, 47 Illinois, p. 251.

The defective execution, if such, in the manner and conduct of the election by having the usual three judges instead of one called a moderator, is a voidable act only, and not void, even if erroneous. It is but an irregularity in the exercise under the power set in motion, and cannot vitiate an election called by the proper authority. In *The People ex rel. v. Garnier*, 47 Illinois 251, it is held that the power to hold an election flows from the action of the officer empowered to call it. When the body has acted, who possess the power, and notice has been given, then the authority of the law has been invoked, and put in action.

In the case of *Marshall County v. Cook*, 38 Ill. 44, 49, 58, a case afterwards overruled by this court in 5 Wallace 772, upon the question of the validity of the bonds, the Supreme court of Illinois, holding the bonds to be invalid because the

election was called by the county court, and not by the Board of Supervisors, make the distinction between the want of power and a defective execution of it, saying that in the latter case acquiescence and treating the act as having been performed in pursuance of authority may render the act valid and binding.

In *Clarke v. Board of Supervisors of Hancock Co.*, 27 Ill. 311, the Illinois court held, "There was no want of authority to order the election, but simply an erroneous mode of submitting the questions. And we have no hesitation in saying, that it was such a deviation from the correct mode as may be rendered valid by subsequent acts, so as to protect the rights of third parties, which may have been subsequently acquired." In the case of *Johnson v. Stark County*, 24 Ill. 75, this court held "that if the irregularity was only such as to avoid "the liability, *upon the grounds of a non-compliance with the "law in holding the election*, it must be insisted upon before the "rights of third persons have intervened."

There is no decision of the Supreme court of Illinois, holding that an election of this kind is invalid, because the usual judges and not a moderator officiated. The case of *The People v. Dutcher*, 56 Illinois 147,—a direct proceeding by mandamus to compel a subscription—does not cover the question. The objection was that the election was held in town meeting manner, and not under the general election laws, and that there was no registration of voters. The court held, that as the township as a corporate body was authorized to hold an election, and no particular mode was prescribed in the act, there was no error in holding it as a town meeting; but the court does not say, nor does it follow, that if held under the general election law the election would necessarily be invalid. And this will appear from another decision upon railroad bonds by the same court, in *Dunnavan v. Green*, 57 Illinois, p. 67, in which the court say, "In the case of People ex rel. v. Dretcher, at the present term, "it was held that under the law of 1865 a registry was not "required in a township election of this character. * * * "That case is decisive of this question. But if it was not, we

"are not prepared to hold that a failure on the part of the proper "officers to make the registry, or the *board of election* to "require each voter to make the required affidavit would "render the election void, or be grounds for vacating the office "of those then elected, or for holding bonds thus voted and "issued, and in the hands of innocent holders, void." In this latter case, the facts were as disclosed by the record of the case, that three judges presided at the election, and not a moderator, but no notice appears to have been taken of this by the court. It is fair to presume that the court, in sustaining that election, did not consider the presiding at the polls of three judges instead of a moderator to be material.

It will thus be seen that the decisions of the Illinois Supreme court simply assert that elections of this character held in the town meeting manner without a registry of voters, are valid. But they do not decide that this form of holding an election is mandatory, in the absence of language to that effect in the law authorizing such an election, nor has it been held that such elections, presided over by the usual judges, are invalid for that reason. The decisions of that court, which hold bonds to have been illegally voted, are confined to the point that the elections were not *called* or ordered by the proper authority.

Clarke v. Board of Supervisors, Hancock County, 27 Ill. 310, 311.

Again: An examination of this special act of March 25, 1869, will show that it was an *election* that was to be held and not a town meeting. An election implies, in Illinois, the opening of polls, the officiating of three judges and two clerks, the depositing of votes by ballot, the keeping of poll books, and the observance of the formalities set forth in the election laws. 1 Gross' Ills. Stat. p. 245, chap. 37, secs. 16, 17, 18, 19, also pp. 254, 255. By an exception in the registry law, no registry of voters is required for a town meeting. A town meeting under the township organization law, whether annual or special, implies a meeting for the transaction of the ordinary town busi-

ness of the nature mentioned in the township law. This business is transacted by the meeting with a moderator as presiding officer, who regulates the business and proceedings, decides questions of order and makes public declaration of votes passed. The vote is viva voce, or by show of hands, may be questioned and a decision had by causing the voters to rise, or be counted off. A reconsideration of the questions may be had in the usual parliamentary way. Certain officers only are required to be elected by ballot. 1 Gross' Stat. (1869), chap. 103, p. 747, secs. 5, 6, 7, 16. All this relates to ordinary town affairs, the township law containing no authority to subscribe to railroad enterprises. Besides, the ordinary special town meeting is called in an entirely different manner, upon a different application, and under notice for a less period of time than that prescribed by this railroad act of March, 25, 1869. This is passed upon by the Supreme court of Illinois, in the unreported case of *Force v. Town of Batavia*, June, 1872, published in 4th vol. Chicago Legal News, 406, 407. "This act authorizing subscriptions to this road, was a special act, and the proceedings under it must be in conformity to its provisions, and we do not think the provisions of the township organization act have any application to the case."

The act of March 25, 1869, says that the clerk is "to call an election in the same manner," that is, by posting notices, etc., "that other *elections* for said township are called." It does not say, as "town meetings" are called but as "other elections" are called. Now other elections held in one of these townships are general elections as well as local ones, and general elections for national, state or county purposes are comprehended by this language: "as other elections for said township are called."

If, as it seems, the clerk can call or give notice of this election, and the time and place of holding it, the same as he would for any general or special election held in the township, it would seem to follow that at such an election, held under a special act and not under any provision of the township law, as

is said in the case of *Force v. Town of Batavia*, cited above, and not required to be conducted in town meeting manner by any provision of the special act, it would be lawful to conduct the same according to the general election laws of Illinois, and that judges or inspectors of election could properly preside at the polls.

The officers, the Supervisor, Assessor and Collector of the town of Ohio, who presided at this election, were by law an election board. Section 1, Art. 18, of the Township Org. Law, says: "Each town, acting under township organization, shall constitute an election precinct, and the supervisor, assessor and collector shall be, ex officio, judges of elections."

1 Gross' Stat. p. 778, Chap. 103.

As this was an election held under a special act, and not a mere town meeting, it would seem highly proper that these ex officio judges should act as the inspectors.

By a statute of Illinois of March 10th, 1869, certain provisions of the criminal code, and all other laws in force in the state punishing frauds in elections, were declared applicable to all elections thereafter to be held in any county, city or township, under any general or special laws of the state, upon the question of subscribing to the capital stock of any incorporated company.

1 Gross' Stat., p. 258, Sec. 98, Chap. 37.

One of these laws, so declared to be applicable to an election, held under the act of March 25, 1869, speaks of the duties of the judges of election, and the penalty imposed for their violation of duty, thus recognizing, when taken in connection with the law of March 10, 1869, the correctness of the position that the usual judges of election were competent to preside at this election.

1 Gross. Stat. p. 254, Chapter 37, Sections 74–75.

It appears, by the facts in the case, that this election was presided over by the officers, who customarily officiate as inspectors of elections in this township. They were the then supervisor, assessor and collector of the town, and by the law, they were *ex-officio* judges of elections in this town. This election

is expressly styled an election by the act itself, and not a town meeting. No prescribed form for holding the election is set forth in the act. There is no decision in Illinois, holding that these officers were not competent judges of such an election. It is reasonable to hold, under these circumstances, that the election held in any mode, recognized by the laws of Illinois, with the usual election board as judges, is an election, under this act, and an election is all that the act in terms requires.

But, if on the other hand, the true construction should be, as contended for by the counsel of plaintiff in error, the objection then goes to the *form*, and not to the *substance*. It suggests a mere irregularity, which would not vitiate an election in a direct proceeding, much less in this collateral way. The manner of holding this election is not made mandatory by the act. We believe the authorities are general to this effect.

In Illinois, it is held, "irregularities in conducting an "election, which deprive no legal voter of his vote, and do "not change the result, never have been held to invalidate an "election. The rules prescribed by the law for conducting an "election, are designed chiefly to afford an opportunity for the "free and fair exercise of the elective franchise; to prevent "illegal votes, and to ascertain with certainty the result. "Such rules are directory, merely—not jurisdictional or imper-"itive. It is the intention of the voters which governs."

Platt, Supervisor v. People, ex rel. Am. Cent. R. R. 29 Ill. 72.

People ex rel. Fuller v. Hilliard, 29 Ill. 425.

McKinney v. O'Conner, 26 Texas 5.

Where no particular *form* is prescribed by the act, an election will not be set aside for irregularities in its conduct.

Phillips v. Wickham, 1 Paige, 590, 599.

Angell & Ames' Corporations, Sec. 138.

Whipley v. McKune, 12 California 358, 362.

Cooley Conslitutional Limitations 618.

People v. Cook, 8 N. Y. (4 Selden) 68, 89.

Taylor v. Taylor, 10 Minnesota 113.

A statute requiring a board of inspectors at elections to consist of three persons, is merely directory. So held in a quo warranto case.

State ex rel. v. Stumpf, 21 Wisconsin 579.

Where a moderator presided, and not three selectmen, at an election, as the statute prescribed in Massachusetts, held the objection immaterial, and no objection to the validity of the election.

Hope Case, Cushing's Mass. Election Cases, p. 71.

So, also, where a town meeting, at which a tax was voted, failed to choose a moderator, held it was an invalid objection as against the collection of the taxes voted at the meeting to urge that the meeting was not duly organized by the choice of a moderator.

Sprague v. Bailey, 19 Pickering 440.

Elections cannot be attacked collaterally for irregularities, but their validity must be tested directly by proceedings instituted for the express purpose.

Bean v. Thompson, 19 N. H. 294.

Bacon's Abridgment, Mandamus D. Com. Dig. Man. D. 3.

Irregular elections are voidable only and not void.

Hughes v. Parker, 20 N. H. 72.
Partridge v. Badger, 25 Barbour 147.
Trustees of Vernon v. Hills, 6 Cowen 23.
Angell & Ames' Corporations, Sec. 137.

Time and *place* are regarded as essential to an election, but many of the details as to the *conduct* of elections are usually regarded as *directory*. Courts are anxious rather to sustain than defeat the popular will.

Cooley Con. Lim., 618.
Dillon on Municipal Corporations, p. 177, Sec. 136.
Clifton v. Cook, 7 Alabama 114.
People v. Cook, 14 Barbour, 259.
People v. Cook, 8 N. Y. 67.

The irregularities complained of must affect the result.

Taylor v. Taylor, 10 Minnesota 107.

Sprague v. Norway, 31 California 173.

Election returns should not be rejected for irregularity in the appointment of officers of election where it does not appear that injurious results accrued therefrom, either in the reception of illegal votes or rejection of legal votes.

Keller v. Chapman, 34 California 635.

People v. Cook, 4 Selden 67.

Redden v. Town of Covington, 29 Indiana 118.

McGraw v. Hanalson, 4 Coldwell (Tenn.) 42.

Clifton v. Cook, 7 Alabama, 114.

Thompson v. Ewing, 1 Brewster (Pa.) 69, 113.

McKinney v. O'Connor, 26 Texas, 6.

The authorities cited above show that irregularities of the kind in question will not vitiate an election, even in a direct proceeding. Much less can they affect the subsequent proceedings, when raised in a collateral way, as in this action. It has been uniformly held in Illinois, that irregularities in the manner of holding railroad subscription elections in municipalities in that State, will not invalidate the bonds issued when in the hands of bona fide holders.

Clarke v. Board of Supervisors Hancock County, 27 Ill. 311.

Johnson v. County of Stark, 24 Ill. 90.

Board of Supervisors of Mercer County v. Hubbard, 44 Ill. 139, 142.

Even in cases of fraud in the election, the citizens to impeach the election must enjoin the issuing of the bonds in apt time. After four months delay, presumption is that rights have been acquired, on the faith of the bonds, that would make it inequitable to restrain their issue, though fraud in the election may have existed.

Prettyman v. Supervisors of Tazewell County, 19 Ill. 414.

Butler v. Dunham, 27 Ill. 474, 478.

We do not believe that this an open question in this court. The case of *Meyer v. City of Muscatine*, 1 Wallace, 385, in which it is held that it cannot be set up against the innocent purchaser, "that the vote was not taken in the form, in which, under the charter, it ought to have been taken," and the other cases cited, in 13 Wallace, 399; 14th Wallace, 296, and 15th Wallace, 360, appear to have effectually disposed of this objection.

II.

The second proposition of plaintiff in error seems to assert that there was an unwarrantable delay on the part of the railroad company in accepting the propositions voted at the election of Aug. 21, 1869; that after such delay the town agents—the Supervisor and Town Clerk—had no authority to issue the bonds and coupons in October, 1870, without a new authority being conferred by another election, prior to the adoption of the constitution of 1870.

This conclusion is not only a *non-sequitur* from the facts, but is based upon an erroneous statement of the facts.

1. As to the delay, there is in the act of March 25, 1869, no requirement that the proposition must be accepted by the railroad company within any given time. In the absence of any such requirement, it is reasonable to say, that it might be accepted by the company at the time when it did so, particularly as the town had never withdrawn it in any legitimate way, nor so intimated, and its own agents dealt with it as if it was in full force.

2. The record shows that the formal acceptance of the vote by entering the acceptance upon the company's records occurred in October, 1870. But the record also shows that in July, 1870, the railway "commenced preparations to build its road, bought and acquired the old grade," etc., in full reliance upon the subscription of August 21, 1869, thereby, by its own acts, in July, 1870, showing an acceptance. We do not see why acts of this

character done in July, 1870, are not equivalent to an acceptance, although the formal record of it may not have been entered in the company's books until afterwards.

3. The authority given by the vote of August 21, 1869, never was rescinded by any other election held for that purpose. Counsel says in his brief, "The officers of said railway having, as late as April, 1870, expressed to the citizens of the town *doubts whether they would ever so accept.*" There is no such evidence. The nearest approach to it in the record is, that at an informal conference concerning the prospects of the railroad in April, 1870, between some of the citizens of the town and some of the officers of the railroad, held without any authority from either town or railroad company, and at which no action was taken, "the president or secretary expressed *doubts as to the ability of said railway to build the road under the conditions of the vote of August* 21, 1869" (Record, p. 42). But it was also proved that this informal meeting "was simply for conference, and to discuss the policy of negotiating with some other railroad for aid in constructing said railway, and that the officers of said railway then present *did not intimate that said railway would not accept or rely upon said vote of August* 21, 1869, and never claimed that a new election would have to be held" (Record, p. 53). Plaintiff's brief says, "And the said town thereafter having called another election, to conform to the views of the officers of said company." There is no such evidence. The record shows "that said railway had nothing to do with said election of June 25, 1870, and that the same was entirely voluntary on the part of the citizens of said town" (Record, p. 53), "and not suggested by said railway" (p. 53). Plaintiff's brief says. "And the people of said town having at said election voted against the proposition to subscribe to said railway." The record shows, on the contrary, by the evidence of the judges and clerks of said election of June 25, 1870, "that said election was not held for the purpose of repealing or rejecting the subscription of August 21, 1869, and was not intended to affect the first election, but to offer said railway better terms

and more favorable conditions, among which was the proposition to pay said railway five per cent. of the amount voted at said first election, in advance of the company's performance of the conditions, in order to enable the company to buy up the old grade of the old Illinois Grand Trunk Railway" (Record, p. 57). The application in the record also shows what these different propositions were, and it was this change in the conditions that was voted down. Besides, it was not proved that this second election was called, nor any notice of it given by any authority whatever. Under the Illinois decisions, such an election, unless called by the proper authority, and the requisite notice given, is invalid. It will be noticed also that it was presided over by three judges, the Supervisor, Assessor and Collector, and not by a moderator. For this reason alone, treating this election as it would be in a direct proceeding, there being no acts done under it in the way of estoppel, such as the issue of bonds and their transfer to *bona fide* holders, this second election is irregular and voidable, according to the plaintiff's own theory.

It thus appears from the facts in the record how erroneous are the statements upon which the counsel bases his theory of delay.

Counsel also says, "And the people of said town having voted to subscribe $40,000, to another railroad proposed to be constructed through the town." This was shown by verbal evidence only; there was no proof by whom this last election was called, nor whether any notice of it was given, nor where or by whom it was held, nor whether it was authorized by any law whatever; nor was there any evidence that any action had been had under this last election, or that any such railroad had ever been constructed, or even commenced. What possible connection this other railroad project has with this case, cannot be discerned by anything contained in this record.

4. The constitution of 1870 did not preclude the issuing of the bonds, after that instrument went into effect. It forbade municipalities from embarking in new enterprises by way of donation or subscription to railroads after its adoption. It did

not forbid, but expressly enabled municipal corporations to consummate prior votes under prior laws by issuing bonds after the time it went into operation.

Various provisions of that constitution are as follows:

"No county, city, town, township, or other municipality, "shall ever become subscriber to the capital stock of any rail-"road or private corporation, or make donations to, or loan its "credit in aid of, such corporation: *Provided, however*, that "the adoption of this article shall not be construed as affecting "the right of any such municipality to make such subscriptions "where the same have been authorized, under existing laws, by "a vote of the people of such municipalities prior to such adop-"tion."

Con. 1870, Art. 14; 1 Gross Stat., p. 59.

Sec. 12, Art. 9, says, * * * "This section shall not be "construed to prevent any county, city, township, school dis-"trict, or other municipal corporation, from issuing their bonds "in compliance with any vote of the people which may have "been had prior to the adoption of this constitution in pursu-"ance of any law providing therefor."

1 Gross' Stat., p. 55.

The schedule provides, "That all laws in force at the adop-"tion of this constitution, not inconsistent therewith, and all "rights, actions, prosecutions, claims, and contracts of this "State, individuals, or bodies corporate, shall continue to be as "valid as if this constitution had not been adopted."

In this case at bar, there was a prior law of March 25, 1869, and a prior vote of August 21, 1869.

The Constitution of 1870, then, does not affect the question at all. The right to subscribe and issue bonds under the vote of August 21, 1869, remains just as it did under the constitution of 1848.

The Supervisor and Town Clerk had been authorized by the vote to subscribe and issue the bonds, and the town had never in any authorized way repealed or rescinded this authority.

There is no period of time fixed in the act of March 25, 1869, nor in the vote itself, limiting the period within which their authority was to be exercised. Hence mere delay on the part of these officers in executing their authority argues nothing.

Society for Savings v. City of New London, 29 Conn. 174, 191.

Again: It is not easy to see how all these extrinsic matters, things done outside of the proceedings connected with the election of August 21, 1869, can affect the innocent purchaser of bonds. Upon what theory of law is he called upon to inquire into or take notice of verbal conversations, informal conferences, and unauthorized dealings between individuals and railroad officers, or even of other and subsequent elections? Upon what theory is he called upon to inspect the private books of a railroad corporation, to which he has no access of right, to ascertain when the directors signified their formal acceptance of the vote in question? It has never been held to be incumbent upon him to do these things. The most ardent stickler for rigid construction has never before reached to the height of this demand.

III.

Plaintiff in error questions the delivery of the bonds on January 6, 1871, because, as he alleges, they were delivered to the company five days before the completion of the railroad, and without the consent of the Town Clerk. The evidence is that the bonds and coupons were signed by the Supervisor and Town Clerk, in October, 1870, and were by the Supervisor and Town Clerk handed over to the Supervisor and another citizen of the town, who, in the latter part of the same month, delivered the papers to one Warfield, a land owner in the town, for safe keeping, with instructions to deliver the bonds and coupons to the company on the completion of the railroad to the town, and that when the railroad was completed, the custodian, upon

a written notification of the completion in accordance with the conditions of the vote, from the Supervisor, delivered the bonds and coupons to the railroad company. The only evidence about the consent of the Town Clerk is that when he delivered the bonds to the Supervisor, he and the Supervisor had an understanding that the papers were not to be delivered to the company without his and the Supervisor's consent; that he had no personal knowledge what became of them after he parted with them and was not consulted with reference to their delivery. (Record pp. 56.)

It appears from the evidence that the conditions of the vote were substantially complied with when the bonds were delivered to the Company. The road had been completed from the east through or into the town, as far as the station, and all the other conditions fulfilled by January 5, 1871, and entirely through the town to the west, by January 11. Of what practical importance the delivery of the bonds only five days before the road was entirely through the town, in view of the fact that no injury resulted therefrom, and the condition as to completion was fully performed on the 11th, cannot now be perceived. But be it as it may, the bonds and coupons were put into the custodian's hands to hold, and with authority to deliver them to the company when the road was completed to the town. Under his instructions a discretion was given him, when he was to deliver, to which both the Supervisor and Town Clerk assented by permitting the papers to pass out of their hands. He was the judge when the time of delivery had arrived. He exercised his discretion in good faith, to the best of his judgment, and upon information furnished by the principal officer of the town. There is no imputation in the record upon the good faith of this custodian.

But even if the bonds were delivered a few days too soon, when the conditions were afterwards wholly fulfilled in this regard, they became binding on the town, while in the hands of the payee, the railroad company, without reference to the ques-

tion of the right of bona fide transferees from the company to protection from this alleged defence.

Furness v. Williams, 11 Illinois, 229, 241.
Price v. Pittsburgh, Ft. Wayne & C. R. R. 34 Ill. 33.

But this defence of illegal delivery of these securities cannot be set up against the defendant in error. As to him, an innocent purchaser without notice of the conditions of delivery, the delivery is absolute, whether the conditions of delivery were complied with or not.

Thomas et al. v. County of Morgan, 39 Ill. 505.

"Even where a note is delivered to a third person to hold as an *escrow*, and he fraudulently puts it in circulation, such evidence cannot be admitted against a bona fide holder without notice."

Vallett v Parker, 6 Wendell, 615.
1 Parsons' Notes and Bills, 51, 279.

Neither could this defence be set up against such holder, even though the bonds had been stolen from or lost by the custodian, or otherwise wrongfully put into circulation without any actual delivery by him.

Chitty on Bills, 254, 256.
Clarke v. Johnson, 54 Illinois, 296.
Shipley v. Carroll, 45 Ill. 287.
Jones v. Nellis, 41 Ill. 482.
McMillan v. Bethold, 35 Ill. 250.
Adams v. Wooldridge, 3 Scam. 355.
Murray v. Lardner, 2 Wallace, 110.

Nor even can the defence avail against such bona fide holder that the bonds were procured by fraud, nor where an agent fraudulently transfers negotiable paper to a person without notice of the fraud.

Mercer County v Hackett, 1 Wallace, 83, 85, 95, 96.
Town of Grand Chute v. Winegar, 15 Wallace, 359, 360, 363, 373.
Edwards on Bills, p. 238, side 252.

Fraud, to affect a *bona fide* holder of negotiable paper, must be in obtaining the execution of the paper; not fraud perpetrated *after* the execution.

Elliot v. Levings, 54 Ill. 213, 214.
Clarke v. Johnson, 54 Ill. 297, 298.

The papers were voluntarily signed by the Supervisor and Town Clerk. They voluntarily put them out of their hands in the custody of others. There was no fraud in the signing practiced upon them. If any fraud at all was committed in the subsequent delivery, it was after the execution of the bonds. But there was no fraud so committed. The papers were given to the custodian under such circumstances as show he was to execute his judgment when to deliver. He delivered them in good faith, believing the conditions on which they were left with him to have been fulfilled. Such delivery on the happening of certain events is not fraud in the execution of the papers, and hence, if it were fraudulent, cannot affect defendant in error.

IV.

It is objected that express conditions were required to be inserted in the bonds, and it is argued that because none such appear in the bonds, the bonds were issued without authority.

There is no requirement in the law of March 25, 1869, nor in the vote of August 21, 1869, that the conditions are to be *inserted in the bonds*. The only authority for counsel's statement is to be found in the application and notice for this election, wherein it is said: "Said bonds to be issued and delivered only on this expressed condition that the aforesaid Grand Trunk Railway shall be completed and the cars running thereon for the purpose of carrying passengers and freight from Mendota through the town of Ohio on the old grade." It nowhere appears that this condition was to be expressed or inserted *in* the bonds. The word, to be sure, is "expressed." The language, however, is not "expressed in writing;" it is not re-

quired that the condition shall be inserted in the bonds. It would be a literal compliance with this language if the condition was expressed orally, when the bonds were delivered. Anything may be expressed by word of mouth, as well as by writing, and as against an innocent holder the construction contended for is too narrow and rigid. The context and the manner in which the word is used, evidently show that the meaning is simply "express," making the clause read "upon the express condition," and that the use of the word "expressed" is only a mere clerical error. If the intention of the signers of the application had been that the condition should be inserted in the bonds, if that had been their meaning, they would have used other and more explicit words.

Moreover, it was unnecessary to insert any such condition, at the time when these bonds were delivered, for the reason that the condition had then been substantially complied with. The evidence shows that the railroad had been completed from Mendota, on the old grade, for the purpose of carrying freight and passengers as far as the depot in Ohio Town, on or before January 5, 1871, and all other conditions performed before that time; and that it was the general understanding of the people of the town, not only at the time of the election, but afterwards, that the completion of the railroad referred to in the condition was from Mendota through the town. Such, also, was the construction given to the same by both the town agents and the railroad officers.

This completion too was to be upon "the old grade," and the evidence identifying this old grade shows that "the old grade" lay between Mendota and the town of Ohio. When the bonds were delivered, the road was in process of rapid construction to its western terminus; had reached the Ohio station; was being built beyond; and on the 11th day of January, was entirely built through the town. Under all these circumstance, of what importance was it to insert in a bond a condition which had been already fulfilled? The object in saying that the bonds should not be delivered only on the express condition that the

road was built from Mendota to this town, was to guard against the possibility of no railroad being built at all. When the object was attained it was unnecessary to express a condition which had been performed. The bonds were dated as of January 1, 1871, but were not delivered by the town agents until January 6th. They were made out and signed in October, 1870, and placed in the hands of the custodian, it being supposed, probably, by all concerned, that the road would be done by January 1st. It thus sufficiently appears, from all the circumstances, that the town agents had concluded not to deliver the bonds in advance of the prosecution of the railroad work, but to wait until that part of it which the condition called for had been done by the railroad. With this view, it is quite clear that the town agents deemed it wholly unnecessary to put into a bond a condition which was only important in the event that the bonds were delivered by them before the railroad had done anything. When, by the progress of the construction of the railroad from Mendota into their town, they saw before them the physical evidence that the railroad was a certainty and not a myth, we contend they were fully justified in not encumbering a bond, intended to be negotiable in the market, with superfluous conditions.

V.

It is also objected that coupons were not authorized to be issued; in other words that the bonds with coupons attached, are not in accordance with the authority given.

The authority, the power, given in the act of March 25, 1869, expressly says that the municipal corporations, embraced in the act, and of which this town is one, might issue bonds "with *coupons* for interest thereto attached." The proposition contained in the application does not forbid the use of coupons, neither does the vote at the election. There is then no prohibition upon the use of bonds in the ordinary and well known method of attaching coupons to represent the interest. Power to subscribe

was conferred, and express power given to the town agents to issue bonds with coupons in payment. The form of the bond was not prescribed in the vote, and hence was largely left to the judgment and discretion of the officers issuing the bonds. In fact the act provides that if a majority of votes at the election is "for subscription," the town agents shall issue the bonds; it is left to them to say in what form, and may be with coupons, because the act in terms empowers the issue of bonds with coupons. The act itself says it shall be liberally, not rigidly construed, and requires the town authorities to provide for the prompt payment of the interest. All these things go to show that the act contemplated the usual form of municipal security —a bond with coupons representing the annual interest. Under such an act, it is reasonable to suppose that the signers of the application and the voters at the election had in view the bond with coupons attached, mentioned in the act, and that when holding an election under the provisions of this law, they used the term "bonds," they meant and referred to the kind of bond specified in the law.

Besides, this is not an open question in this court. Under laws less explicit than the one in question, this court has held that the power to subscribe implies the power to issue bonds and coupons, though nothing be mentioned about bonds and coupons. If it be implied in the law, it may be likewise implied in a vote under the law, when the vote does not expressly prohibit it.

Woods v. Lawrence Co., 1 Black 386, 391, 407.
Curtis v. County of Butler, 24 Howard 435.
Gelpcke v. City of Dubuque, No. 81, 1 Wallace 221.
Seybert v. City of Pittsburgh, 1 Wallace 272.

The objection as to want of power to issue coupons was directly made and overruled in

Comrs. Knox Co. v. Aspinwall, 21 Howard 540, 546.

In *Woods v. Lawrence Co.*, 1 Black 388, 391, 406, 407, 413, the resolution of the grand jury was for the issue of bonds, without saying anything about coupons. Bonds with coupons were issued by the commissioners. The objection that the

grand jury did not prescribe time and manner of payment, nor authorize issue of coupons, was overruled.

In *Rogers v. Burlington*, 3 Wallace 655, the vote of the electors was upon the question of issuing bonds simply. Bonds with coupons were issued, and judgment rendered on the coupons was sustained.

In *Bushnell v. Beloit*, 10 Wisconsin 196, it is held "that "authority to town officers to issue bonds to a railroad carries "with it the incidental power to issue them in negotiable form, "and to give them the character belonging to that class of "securities in the market."

IT IS OBJECTED FURTHER THAT THE INTEREST WAS MADE PAYABLE ANNUALLY.

This also is not a new question in this court.

In *Meyer v. City of Muscatine*, the proposition voted upon at the election was to issue bonds, "at a rate of interest not higher than *ten per cent. per annum.*" Bonds calling for interest at ten per cent. per annum, *payable, semi-annually*, with coupons for the semi-annual interest, were afterwards issued. In a suit on the coupons, objection being made that the authority conferred by the vote was transcended, this court held that the objection had no foundation, and that it was lawful to contract for the payment of the rate at periods shorter than a year, before the principal debt became due.

1 Wallace 387, 388, 391.

In *Rogers v. Burlington*, 3 Wallace, 655, the question submitted and voted for at the election was for "bonds payable in twenty years from date of issue, *with an interest of ten per cent. per annum*," nothing being mentioned about payment of interest annually. Coupon bonds, with interest payable annually, were issued under this vote, which referred on their face to this proposition and vote as above stated. The validity of the coupons in the hands of a bona fide holder was sustained by this court.

In *Johnson v. Stark County*, 24 Illinois 76, 78, 82, the proposition at the election was for twenty year bonds, with interest at six per cent. per annum. Bonds calling for annual interest, with coupons, were issued. Judgment on the annual coupons was affirmed by the Supreme court of Illinois.

The same doctrine is sustained by analogy in other cases.

"If a municipal corporation have express authority to issue negotiable bonds, such bonds will not be void in the hands of a bona fide holder merely because *made payable at an earlier date* than directed by the city ordinance relating to the mode of executing them."

Gilchrist v. Little Rock, 1 Dillon C. C. R. 261.

The Supreme court of Ohio say:

"As to the objection resting on the want of conformity "between the terms of the bonds *as issued* and the *terms pro-* "*posed* in the *notice of election*" (the notice said "payable in "fourteen years, or at option after four years; the bonds on "their face said payable in twenty years, and at option after "fourteen years") "this objection does not go *to the question* "*of power*, but rather to that of good faith. This non-con- "formity, if substantial and to the prejudice of the township "would have been at the proper time a good cause for enjoining "the trustees from executing and negotiating the bonds in ques- "tion. But as to third parties it is a different question."

Shoemaker v. Township of Goshen, 14 Ohio State 584.

But independent of decisions, the fair meaning of the act and the vote in this case is, that the coupons were intended to be payable before the principal of the bonds was payable. The language of the law of March 25, 1869, is that bonds were to be issued, with coupons for interest attached. The second section speaks of the town authorities making all necessary arrangements and providing for the prompt payment of all interest and other liabilities accruing on the bonds, thereby implying that interest was to be paid annually or in advance of the

principal. Section three calls for a liberal construction of the act, and not a rigid one. By section one, if a majority of votes at the election is for subscription, it is left to the persons issuing the bonds to say in what form they shall be, and by the preceding language, coupons for the interest may be attached. The main question submitted in the application and election notice, was the question of subscription to a certain amount. No prohibition upon making the interest payable annually was mentioned. The bonds referred to in those papers are, obviously, the bonds permitted by the act, and such as the town agents might issue under the law and the vote. Making the interest payable annually contravenes no requirement of the act or the vote, is in accordance with universal custom as to this class of securities, was appropriate to the object in view, and did not impose any additional burden on the town, but rather lightened it by enabling it to provide for the payment by annual taxation. As the object of the issuing of bonds was to aid in the construction of a railroad, and to enable the bonds to be negotiated for that purpose, it is apparent that negotiable bonds were intended, and to be negotiable, the common understanding and practice are, that they should call for annual interest. This is but a reasonable construction, under all the circumstances of the case.

VI.

Another objection is, that the Illinois Grand Trunk Railway, at the time when the election of August 21, 1869, occurred, had not been organized, and had no legal existence. Ergo, the election, was void, because the vote was to subscribe to a company not then in existence.

This conclusion does not follow from the premises assumed, even if they were founded on fact, on which they are not. The Illinois Grand Trunk Railway had at that time a legal existence. By the first section of the act, in force February 28, 1867—found in the bill of exceptions—certain persons, therein named, were created a body corporate by the name of the "Illi-

nois Grand Trunk Railway." By the sixth section, the corporators named in the first section were appointed the directors of the corporation to hold their offices for one year from the first day of June, 1867, or until others were elected. They were also appointed commissioners to open stock subscription books, etc. The evidence in the bill of exceptions is that said corporators accepted their said offices as directors, and acted as such from the passage of said act until the formal organization of the board of directors, on January 20, 1870, when a president and secretary of the company were duly elected. Here, then, was a corporation with a board of directors named, created by law on February 28, 1867. The corporation, therefore, had a *de facto* if not a *de jure* existence, and a *de facto* existence is sufficient in any collateral proceeding like this.

1. In a case very similar in this respect, and where it was urged that a failure to organize under a charter, prevented a corporation from taking and holding real estate by deed, this court held:

"It is supposed that there are some conditions precedent "to the existence of the corporation which have not been per- "formed, and that the act, of its own force, did not constitute "them a corporate body. But a slight reference to the charter "will show that the position is a mistaken one. The first sec- "tion declares, that the four persons, and such others as may be "associated with them, shall be and are hereby incorporated "and made a body politic and corporate, by the name of the "Frostburg Coal Company; and then confers upon it the usual "powers belonging to a corporation, and among others, to "purchase and hold real estate for the purposes of the com- "pany, etc. The charter took effect immediately on its accept- "ance by the persons named, and the subsequent steps, such as "the subscription of the stock, election of directors, of the "president and secretary, passing by-laws, etc., were steps "taken in perfecting the organization and enabling it to use the "powers and privileges conferred, etc.

"The main ground on which we intend to place the judg-

"ment of the court is, *that the defendants were made a cor-*
"*poration by the charter, the persons named in it constituting*
"*the corporate body*, clothed with the powers and privileges
"conferred upon it, and were capable of taking and holding
"real estate; and, second, even if it were otherwise, and some
"irregularities occurred in the organization of the company,
"inasmuch as no act made a condition precedent to the exist-
"ence of the corporation has been omitted, or its non-perform-
"ance shown, a party dealing with the company is not permitted
"to set up the irregularity. The courts are bound to regard it
"as a corporation so far as third persons are concerned, until
"it is dissolved by a judicial proceeding on behalf of the gov-
"ernment that created it."

Lessee of Frost v. Frostburg Coal Co., 24 Howard, 281–283.

In *Woods v. Lawrence Co.* 1 *Black*, 390, 406, 407, 409 and 410, the point was directly made that when the grand jury recommended the subscription, the railroad company *had not been organized:* the objection was held invalid, for the reason, among others, that it was intended that the subscription should precede the organization, and that there was no inducement to organize unless the subscriptions were first secured.

2. The town of Ohio, in the application notice, and other proceedings at the election, and in the bonds issued, recognized the railroad company as a corporation de facto in 1869, and is estopped to deny it. It thus admits its corporate existence at that time.

Ramsey v. P. M. & F. Ins. Co. 55 Ill. 311, 314.
Wood v. Kingston Coal Co. 48 Ill. 356.
Mitchell v. Deeds, 49 Ill. 417.
Illinois Grand Trunk R. R. v. Cook, 29 Ill. 242.
Rice v. Rock Island R. R. Co. 21 Ill. 93.

3. By the act of March 25, 1689, amending the charter of the Illinois Grand Trunk Railway, the legislature recognized the existence of the railroad as a corporation, and by so doing,

precluded all inquiry into the regularity of its organization, even in a direct proceeding by *quo warranto*.

Jameson v. People, ex rel. 16 Ill. 257, 258.
Hamilton v. President and Trustees, 24 Ill. 23, 24.
Toledo, P. and W. R. Co. v. President, et al. 43 Ill. 209.
People, ex rel. v. Farnham, 35 Ill. 562, 566.

4. The allegation that a company, which claims to have become incorporated, has never been legally organized as a corporation, or has never existed as such, can be ascertained in no other way than by a direct proceeding by *scire facias*, or an information in the nature of a *quo warranto* in a court of law.

Baker v. Admr. of Backus, 32 Ill. 82.
President, et al. v. Thompson, 20 Ill. 197.
Mitchell v. Deeds, 49 Ill. 417.
Goodrich v. Reynolds, 31 Ill. 490.
Marsh v. Astoria Lodge, 27 Ill. 421.

5. Stock subscriptions, made before the organization of a company, will be enforced, if the organization is afterwards perfected. And a stock subscription, made in contemplation of a charter to build a railroad, is a valid contract, and will be enforced.

Cross v. Pinckeyville Mill Co. 17 Ill. 54, 58.
Tonica & Petersburg R. R. Co. v. McNeely, 21 Ill. 71.
Griswold v. Trustees, 26 Ill. 41.
Johnston v. Ewing Female University, 35 Ill. 518, 527.
Stone v. Great Western Oil Co. 41 Ill. 86.
Snell v. Trustees, 58 Ill. 290.

VII.

It is gravely stated in plaintiff's brief, as another objection to these bonds and coupons, that the election of August 21, 1869, was held to subscribe aid in the construction of a railroad from Mendota west, and that the subscription was thus not made to

the Illinois Grand Trunk Railway. Here is another reckless perversion of the testimony. It is sufficient to say that there is nothing in the record to justify this assertion.

The bill of exceptions shows upon its face, that the application, the election notice, the poll books and the vote, the bonds, and the certificate of stock issued and received by the town, all recite or relate to a subscription of $40,000 to the capital stock of the Illinois Grand Trunk Railway, and to no other or different corporation. The "general understanding," which plaintiffs' brief misconstrues, the record shows, was the general understanding of the people of the town, as to what one of the conditions of the vote concerning completion meant.

If the objection made, means however—what it does not say—that this town had no right to subscribe to the Illinois Grand Trunk Railway, with a condition that the subscription or the bonds issued, should depend upon the Company's constructing a portion of their road west of Mendota, so as to run through this town, we answer that under the act of March, 25, 1869, the town could impose this condition if it saw fit, or subscribe with or without any conditions. Putting a condition into the election notice as to how much of the road should be finished before the bonds might issue, in no manner changes the fact that it was a vote to subscribe to the capital stock of the Illinois Grand Trunk Railway under this law, no matter what the termini or the powers of this railway were.

VIII.

It is objected that the bonds and coupons are *signed* by the Supervisor and Town Clerk only, and by no other officer of the town; and that they do not purport to be *issued* upon the authority or by the direction of the corporate authorities, but solely upon the authority of the Supervisor and Town Clerk, who had no authority to create a debt against the town; and that, therefore, the bonds and coupons are void upon their face, because they disclose upon their face that they had been *issued* without authority.

There are in this objection three assumptions of law and of fact, which an examination of this special act of March 25, 1869, and the recitals in the bonds will show to be erroneous.

1. The act itself does not require the bonds and coupons to be *signed* as the counsel claims. They are not directed to be *signed* by any particular officers. The words used are, "the corporate authorities of said city, town or township, and the supervisor and town clerk of said township, so voting," "shall *cause bonds to be issued*," etc. Here is no mode of signing prescribed. The signing might be done by one or more under the directions of the persons authorized to *cause* the bonds to issue. The expression, "*cause* bonds to be *issued*," implies the power to delegate the signing to be done by a clerk or an agent. The counsel might as well claim that when a county court or board of supervisors issue such bonds, and directs them to be executed by its chairman or clerk, that the bonds are invalid because not signed by every member of the board or court.

2. The recitals in the bonds use language which, in meaning and effect, is equivalent to saying that they were issued under the authority of the persons appointed in the act to issue them. Each bond recites on its face:

"This bond is *issued* under and by virtue of the charter of said Illinois Grand Trunk Railway, and amendment thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township, at the special election, held August 21, A. D. 1869, in accordance with said charter and amendment, and laws. In witness whereof, the *said township of Ohio has caused these presents to be signed by the supervisor and Clerk of said township, this first day*," etc.

Here is a direct recital that the bonds were issued in accordance with this law of March 25, 1869, it being the amendment to the charter referred to. And in addition, is the recital that the township has *caused* the bonds to be signed by the Supervisor and Clerk.

These expressions are equivalent to saying that the bonds have been issued by the proper persons. Reciting upon

their face that they have been issued under and by virtue of this special law, in accordance with the vote of the electors at the special election, held August 21, 1869, in accordance with said amendment, and reciting also that the township has caused them to be signed by the Supervisor and Town Clerk, these bonds purport upon their face, in the plainest manner, to have been issued in conformity with the authority given.

3. It is thus apparent that the third statement of counsel that the bonds disclose upon their face that they had been issued without authority, cannot be sustained. The recitals are otherwise. The bonds purport to have been issued by authority of the township itself under the law, and hence must have been issued by the agents appointed by the law to do the act for the corporation.

Under such recitals as these, the innocent purchaser has the right to presume that the necessary formalities were observed in issuing the bonds. To this purport, are the authorities, as in *Town of Grand Chute v. Winegar*, 15 Wallace, 358, 373, where the bonds were signed by a chairman of the town board of Supervisors, and as in *Johnson v. County of Stark*, 24 Illinois, 78, 82, where the County Clerk and chairman executed the papers, issued by a County Board of Supervisors. These bonds purporting on their face to have been issued by the plaintiff in error, and by virtue of the law of March 25, 1869, the presumption is that they were issued under the circumstances giving the requisite authority, and a want of compliance on the part of the town with formalities required by the statute cannot be shown in defence.

Town of Grand Chute v. Winegar, 15 Wallace, 356, 373.

Gelpcke v. City of Dubuque, 1 Wallace, 203.

Rogers v. Burlington, 3 Wallace, 654.

Meyer v. City of Muscatine, 1 Wallace, 385.

A critical examination of this special act, however, will show that the Supervisor and Town Clerk were the only persons intended to be authorized to issue bonds in the case of a town-

ship. Counsel for plaintiff in error presents a construction, which sticks in the bark, when he insists that corporate authorities, in conjunction with the Supervisor and Town Clerk, are to issue the bonds. This will appear, from the following considerations:

1. A literal reading of the clause, "then the corporate authorities of said city, town or township, and the supervisor and town clerk of said township, so voting, shall cause," etc., would require in the case of a city, that the Supervisor and Town Clerk of some township must unite with the authorities of the city before the city could issue its bonds, or *vice versa*, that the corporate authorities of a city must unite with the Supervisor and clerk of a township, an entirely different corporation, before bonds could issue from the township. Laying such literal stress upon the copulative, "and," would produce this result—an absudity which is to be presumed the legislature never intended. This, then, opens the door to construction, and shows that this literal reading cannot be justly sustained in arriving at the intention of the legislature.

2. The words, "corporate authorities," in their ordinary acceptation, as used in this act, were evidently intended to apply to the corporators or municipal authorities of a city or chartered town, such as the Mayor and Common Council, or a President and Board of Trustees. A township, under the Illinois system, has no corporate authorities in the well recognized use of those terms, like those of a chartered city or town. By the township organization law, it is declared a body corporate, with power to sue and be sued, etc. But it has no legislative body, with power to make by-laws or ordinances; nor is it required or empowered to have a corporate seal. The only by-laws it can make, must be in town meetings, and these relate to ordinary town affairs. It has certain powers and officers whose duties are defined by the law, but none of these are of the character defined in a charter of incorporation. The Supervisor is the principal officer. He represents the town in the county legislature, the board of Supervisors; is the officer

upon whom process against the town is served, and holds and disburses the town moneys. He prosecutes and defends all suits brought by or against the town, and in many other respects more prominently represents the town than any other officer. He and the town clerk, who keeps the records, more nearly approximate to those officers who are corporate authorities in a city, than any other township official. An examination of the township law, will disclose the fact that nowhere in it is there any language creating or designating any officers or set of officers as corporate authorities, as do city or town charters.

3. Even if a township had "corporate authorities," the supervisor and town clerk would necessarily be a part of them, and embraced in the term "corporate authorities," because they are elected to office by the people, and are the most prominent and responsible officers of the town. Yet in this act, the expression "corporate authorities of said city," etc., is connected by the word "and" with the words "supervisor and town clerk," a use of language which, under the plaintiff's theory, would convey the idea that corporate authorities are a separate body, and that the Supervisor and Town Clerk do not belong to them. This is another circumstance to show that the legislature did not intend to apply the words in question to the case of a township.

4. The true interpretation, derived from our knowledge of the ordinary use and acceptation of the words "corporate authorities," as being applicable only to cities or chartered towns, and from the legal constitution of a township, should be to read the clause as if the words "as the case may be" were inserted after the words, "supervisor and town clerk of such township," or to construe the conjunction "and" as meaning the same as "or." There being no corporate authorities in a township, in the ordinary sense of the words, the word "and" is senseless, and the substitution of "or" will establish a sense consistent with the facts. Such change is admissible by the rules of legal construction.

2 Parsons' Contracts, p. 497.

Ex parte Bollig, 31 Illinois 94.

5. The use of the words, "supervisor and town clerk," in connection with the word "township," causes the sentence to come within the familiar rule, "the expression of one thing is the exclusion of another." Conceding that there are such persons as "corporate authorities" of a township, and that the Supervisor and Town Clerk are a part of them, this subsequent specific mention of the Supervisor and Town Clerk as the particular officers who are to issue the bonds, excludes the idea that any other authorities are also to act, particularly as none others are designated by name.

Counsel cites in his brief the provision of the constitution of 1848, vesting corporate authorities with power to assess and collect taxes for corporate purposes, and cites some decisions of the State Supreme court construing this provision; and he claims that under these decisions the legislature could not constitutionally authorize any but the general corporate authorities of the town to create the indebtedness.

If it is meant that the Supervisor and Clerk *created* this indebtedness, we say that they did not. It was created by the vote of a large majority of the voters of the town. And if it is meant, too, that with the assent of the people of the town, the Supervisor and Clerk could not be constitutionally designated to issue these bonds, we answer that the Illinois Supreme court has not so decided, and that the doctrine of the decisions cited is not correctly stated by the counsel.

The Illinois Supreme court defines the term "corporate authorities" as used in the provision of the constitution of 1848, cited, as follows:

"Corporate authorities are those municipal officers who are "either directly elected by the people to be taxed, or appointed "in some mode to which they have given their assent."

People ex rel. v. Mayor of Chicago, 51 Ill. 30.
Harward v. St. Clair Drain. Co. 51 Ill. 136.
Lovingston v. Wider, 53 Ill. 302—304.

In the case of the *People ex rel. v. Salomon*, 51 Illinois, 50, the court explains:

"There is no prohibition which we have been able to dis-
"cover and we have been pointed to none, against the creation,
"by the legislature, of every conceivable description of corpo-
"rate authority, and when created to endow them with all the
"faculties and attributes of other pre-existing corporate author-
"ities. Thus, for example, there is nothing in the constitution
"of this State, to prevent the legislature from placing the po-
"lice department of Chicago, or its fire department, or its water
"works, under the control of an authority which may be con-
"stituted for such purpose by a vote of the people, and endow
"it with power to assess and collect taxes for their support, and
"confide to it their control and government. Section five of
"Article nine, would not be violated thereby, because the au-
"thority thus established, would be a corporate authority."

This was said in a case, holding three Park Commissioners in Chicago to be corporate authorities, and thus establishing the doctrine that the legislature may appoint one or more persons to levy taxes or issue bonds, if they are officers elected by the people to so act, or if the people assent by adopting the law.

In *Harward v. St. Clair Drain. Co.* 51 Ill. 137, the court holds, that drainage commissioners elected by the people of a county, and levying taxes for drainage purposes, are corporate authorities under the meaning of the constitution.

The doctrine of the Illinois cases simply is, that the legislature cannot levy taxes upon, or create debts against municipal corporations, or appoint officers to do so, without the assent of the citizens being manifested in some way. This assent may be manifested by electing persons to the offices so constituted by act of the legislature, or by voting for or under the law, in which officers may be named, and thus constituting the officers named as corporate authorities. 51 Ill. 51, 52.

It will appear, from an examination of these authorities, that it is not held in Illinois that under the constitution of 1848 none but the general corporate authorities can be authorized to create an indebtedness. Any authorities may be appointed to create an indebtedness, if the citizens assent by

adopting the law, or elect men to offices attended with such powers. The cases upon which plaintiff's counsel relies, are all cases in which the legislature attempted to appoint police commissioners or park commissioners in the city of Chicago, or East St. Louis, with powers of taxation, without submitting the law itself to a vote for adoption, or requiring the commissioners to be elected to office. Hence they were not corporate authorities in the sense of the constitution. But in the case cited from 51 Ill. 51, 52, the three park commissioners were held to be corporate authorities because, though they were appointed to office by the governor, the law under which they acted had been adopted by the citizens. And this was in the city of Chicago, which has a mayor, common council, and other municipal departments, composing the general corporate authorities of that city. Corporate authorities, empowered to create a debt, therefore, do not necessarily mean the general corporate authorities of a municipal corporation.

It is claimed in the counsel's brief, on page 20, that the Supreme court of Illinois have decided that the Supervisor and Town Clerk are not the corporate authorities of a township. And counsel, on page 21, professes to quote from the decision. We have before us, a certified copy of that decision, and we find, first, that counsel miscalls the case, it being entitled *Marshall v. Silliman*, and second, that the passage quoted is not given in full so as to present the true meaning of the court. By omitting some sentences and words, and the entire context, certain sentences are thrown in juxtaposition, and not in the order or connection given them in the original. The effect of this arrangement is to give a meaning to the opinion, which the judge who wrote it probably never intended. Besides, the matter thus excerpted is but dictum or illustration, as will be seen by examining the opinion. That there may be no mistake about this, we file (the opinion not being in print) with the clerk, a certified copy of the opinion of the court just as it is.

What, however, was this Brimfield case? In August, 1868, a special election was held in Brimfield township to vote

upon subscribing to a railroad project. The only authority for taking the vote, which was subsequently declared invalid by the Supreme court, was that found in the township organization law providing for calling special town meetings, and in this there was no legislative authority whatever, to subscribe to a railroad or any other project. Afterwards, on April 17, 1869, the legislature passed an act declaring this election, and the bonds issued under it, valid. The Supreme court held the election a nullity, because no law existed authorizing a vote, when it was held, and that the curative act could not make a void election valid; that the law, if valid, had the effect of creating a debt against the township; that the question whether the subscription was binding, did not depend merely upon whether the legislature can pass a retrospective law, but upon whether it can create a debt against a town and require the town to assess a tax for its payment; that the town never consented to the creation of the debt, because there being no law authorizing it to be held, the election was a mere idle form.

It will be seen that the question in the case was whether the legislature could confer upon the Supervisor and Clerk the power to issue bonds, without the assent of the citizens being manifested in some manner. And to distinguish the case from a previous one in 34 Illinois 420, where it is held that the President and Board of Trustees of an incorporated town may be so empowered, the court used the illustration that the Supervisor and Clerk do not represent a township as the Board of Trustees represent an incorporated town, they being but a part of the corporate authorities. Says the court: "Though elected by the people, they are not elected for the purpose of creating a debt, or imposing a tax, and the legislature could not clothe these two officers, without the consent of the people, with a *discretionary power of taxation, or of creating a debt, because they are not by themselves* the corporate authorities in the sense of the constitution."

We have given, in an appendix, the extracts which the counsel attempts to quote, and from them it will be seen that

the point in the case was whether the legislature could impose the debt upon the town without its assent. But the reasoning of the court does not deny, but, on the contrary, admits that if an election be held under an existing valid law, and the Supervisor and Town Clerk issue bonds, such proceedings are valid, because the assent of the citizens is given, and the Supervisor and Clerk are thus constitutionally clothed with the power to act. As an evidence of this it appears from this Brimfield opinion that other bonds issued by the Supervisor and Clerk, after a vote had been had under a law authorizing the election, were declared valid by the same decision, and no constitutional provision was thereby infringed.

It is claimed further that the board of auditors of the township are the general corporate authorities meant. There is nothing in the township law creating or calling them such. Clearly they are not clothed with such powers. For the reason given in the Brimfield opinion, they do not represent the town as the President and Board of Trustees of a chartered town do. They have no legislative authority. They cannot create indebtedness, nor levy taxes. Their sole business is semi-annually, to examine and audit claims or bills against the town, accruing in the ordinary course of the town business. They are not empowered to issue bonds.

The statute defining their duties says :

"Sec. 1. In each town the Supervisor, Town Clerk and "Justices of the Peace of the town, shall constitute a board of "auditors to examine the accounts of the overseers of the poor "and the commissioners of highways for such town, for moneys "received and disbursed by them.

"Sec. 2. Provides for filling vacancies in case of absence.

"Sec. 3. Provides for semi-annual meetings.

"Sec. 4. Provides for filing accounts with Town Clerk.

"Sec. 5. The board of auditors, composed of the same "officers then in office, shall at the same time and place as "stated in Sec. 3, examine and audit all charges and claims

"against their respective towns, and the compensation of all "town officers, except Supervisors, for county services.

"Sec. 8. The following shall be deemed town charges:

"1. The compensation of town officers for services ren- "dered their respective towns. 2. Contingent expenses nec- "essarily incurred for the use and benefit of the town. 3. The "moneys authorized to be raised by the vote of a town meeting "for any town purposes; and 4. Every sum directed by law "to be raised for any town purposes.

"Sec. 7. The said board shall make a certificate, to be "signed by a majority of said board, specifying the nature of the "claim or demand and to whom the amount is allowed, and shall "cause said certificate to be delivered to the town clerk of said "town, to be by him kept on file for the inspection of any of "the inhabitants of said town; and the aggregate amount shall "be delivered to the supervisor, to be by him laid before "the board of supervisors at their annual meeting. The board "of supervisors shall cause the amount of said charges to be "levied upon the property of said town and collected as other "taxes are levied and collected. The claims and compensation "audited and allowed shall be read to the electors at the next "annual town meeting as directed in section 4 of this article."

T. O. Law, Art. 10, 1 Gross Stat. p. 753.

This statute shows that this board is a mere auditing committee to examine and pass upon town expenses voted and incurred by the town. They are not even authorized to issue any certificates of indebtedness to the persons having the claims, much less to issue bonds. None of the provisions of the township law concerning the board of auditors and their duties apply to the proceedings under the act of March 25, 1869. We deny the right of the auditing board to create a debt against the town. They only pass upon or audit it, after the manner of a finance committee.

Sufficient has been said thus far to show that much of the argument and the authorities cited in the brief of plaintiff in

error is inconsistent with the facts in the case, and inapplicable. The brief assumes, as a fact, that the Supervisor and Town Clerk created the indebtedness for which the bonds issued, when, on the contrary, it was created by a large majority vote of the citizens of the Town, thereby giving their assent to the issue of the bonds by the Town agents. The brief assumes that the Supervisor and Town Clerk are only a part of the corporate authorities of the Town, and therefore could not issue the bonds, when, in fact, the real question is, are they not the persons designated by the act of March 25, 1869, to make the issue, it being of no sort of consequence in this case whether the persons appointed to issue the bonds filled any town office or not, as held by this court in *Sheboygan Co. v. Parker*, 3 Wallace, 93 and 96.

The brief assumes that a township has corporate authorities, upon a mere dictum or illustration in an opinion, intended for another purpose, and without any authority for the statement, assumes that a mere auditing board for ordinary town expenses, are such corporate authorities, when in fact any person may be such corporate authority, who is designated by law, with the assent of the citizens to create an indebtedness, and when, also, this auditing board have no power to create any indebtedness, nor do any other act than to examine and audit ordinary town expenses, and give the Supervisor a certificate of the amount to lay before the County Board of Supervisors.

The brief further assumes that the Supervisor and Town Clerk alone issued the bonds and coupons, when in fact they purport on their face to have been issued in conformity with the law, and as the act of the Township, and there is no evidence in the record that the proper authorities, whoever they may be, did not direct their execution.

We deduce from these considerations, from the interpretations of the state constitution, by the Illinois Supreme court, from the provisions of the township organization law and the special act of March 25, 1869, these conclusions:

FIRST. That in a township there is no official body, known

as general corporate authorities as in the case of a chartered municipality, or a county board of supervisiors created a body corporate by that name.

SECOND. That in the sense of the constitutional provision commented upon, corporate authorities are any one or more persons appointed by the legislature to do an act assented to in some manner by the people to be taxed.

THIRD. That because one officer of a township may be a corporate authority for the purpose embraced within his special duty, he is such corporate authority for that purpose and no other.

FOURTH. That in the act of March 25, 1869, the only officers named in the case of a township to issue bonds, are the Supervisor and Clerk. There being no other corporate authorities for this purpose known in the township law, and no township officer having power to act, except by virtue of this law, it follows that the Supervisor and Town Clerk are the only persons made by this law corporate authorities in the constitutional sense, and hence, that in this law, Supervisor and Town Clerk and "corporate authorities" in the case of a township, mean one and the same thing.

FIFTH. That the assent of the citizens of Ohio to the action of the Supervisor and Town Clerk under this law of March, 1869, was obtained in two ways: first, by the direct vote of the majority of voters of the town at the election of August 21, 1869, held under this law; and second, by the election to office of the Supervisor and Town Clerk at the annual town meeting in April, 1870, held after the election of August, 1869, those officers being then clothed with the power to issue bonds by the prior law. By electing officers empowered by law to do various acts, the people assent to their exercising the powers conferred on them by law. And the assent in this manner, is as fairly to be implied by their election to office as it was in the case in 51 Illinois 50, where it was held that voting for the park law gave the assent to commissioners, appointed by the governor to levy taxes under the park act, and constituted them corporate authorities.

It is claimed, that the decision on the part of the town agents as to whether the conditions of the vote had been complied with, involved an exercise of judgment on the part of the persons named in the act to issue the bonds, and it is inferred that if their decision was erroneous, the indebtedness was not created and the bonds could not issue. Of course it was the duty of somebody on the part of the town to decide when the conditions of the vote were complied with. No one is designated to determine the question but the persons named in the law. Those persons, we have already argued, are the Supervisor and Town Clerk only. But if as plaintiff's counsel claims, some other persons, whom, however, he fails satisfactorily to designate, were to unite with those officers, we answer that the bonds on their face recite that they were issued in accordance with the vote and the law, and that the bona fide purchaser of the bonds in such case has the right to assume that all these preliminaries and conditions had been performed, from the fact of the issuing of the bonds, bearing upon their face such recitals. This has been said so often by this court, beginning with the Aspinwall case, that it seems hardly necessary to discuss the question. There was no want of legislative power when the vote was had, nor when the bonds were delivered, the constitution of 1870, in the provisions we have heretofore pointed out, expressly providing for the making of subscriptions and the issuance of bonds after its adoption.

Comrs. Knox Co. v. Aspinwall, 21 Howard 539.
Bissell v. City of Jeffersonville, 24 Howard 288.
Moran v. Comrs. Miami Co., 2 Black. 722.
Mercer Co. v. Hacket, 1 Wallace 83.
Van Hostrup v. Madison Co., 1 Wallace 291.
Meyer v. City of Muscatine, 1 Wallace 385.
Larned v. Burlington, 4 Wallace 276.
Pendleton Co. v. Amy, 13 Wallace 305.
Lexington v. Butler, 14 Wallace 283.
Town of Grand Chute v. Winegar, 15 Wallace 356.

To prevent misapprehension, we refer here to the proofs

recited in the bill of exceptions showing that the conditions of the vote of August 21, 1869, were in fact substantially complied with when the bonds and coupons were delivered to the railroad company. The condition in the vote as set forth in the election notice was: "That the aforesaid Grand Trunk Railway shall be completed and the cars running thereon for the purpose of carrying passengers and freight from Mendota through the town of Ohio on the old grade, and it is further conditioned that the depot shall be located on the old site selected by the old Illinois Grand Trunk Railway Company."

The ninth statement in the bill of exceptions shows that it was proved that prior to the 5th of January, 1871, the depot was located as required by the condition; "that the railroad was completed and the cars running thereon for the purpose of carrying passengers and freight from Mendota through said town on the old grade," as far as the station or depot in said town, on or before the 5th day of January, 1871, clear through said town on the 11th day of January, 1871, and soon after via Prophetstown, in Whiteside county, Illinois, to the Mississippi river; that the "old grade," mentioned in said conditions, was an old grade thrown up and constructed by a former railroad in places between said Mendota and said town of Ohio; that at the time of said vote of August 21, 1869, and afterwards, it was the general understanding of the people of said town that "completion" of the railroad referred to in said conditions was from Mendota through said town, and that such was the construction given to the same, by both the agents of said town and the officers of said railway, and further, that said railroad has ever since the delivery of said bonds been in operation as such."

A fair construction of the condition shows that the "completion" mentioned was from Mendota west through the town. It does not say nor mean that the whole line from Joliet to the Mississippi, which the company had the power to build, was to be constructed before the road should receive these town bonds.

The use of the words, "from Mendota through said Town

on the old grade," qualifies and limits the preceding words. As this old grade only lay between Mendota and this town, the condition was fulfilled when so much of the railroad was completed as would suffice to carry passengers and freight from Mendota through the town on this old grade. The object of the voters in securing railroad communication between their town and Mendota, a railroad centre, was subserved in this manner, and it is evident that they intended that the bonds should be delivered when this event happened, from the nature of the language. If they had intended otherwise, different language would have been used, and the completion would not have been limited to the particular points from Mendota through the town.

The evidence also shows that this was the understanding of the meaning of this condition on the part of the officers and the people of the town. They understood that the condition was to be considered fulfilled when the railroad was built from Mendota through Ohio Town. And this has been the construction placed upon it by the town agents.

This court has frequently taken, as evidence, the construction given in this manner, to such matters by the municipal agents.

Van Hostrup v. Madison City, 1 Wallace 297.
Meyer v. City of Muscatine, 1 Wallace 391.
James, et al. v. City of Milwaukee, No. 56, December Term, 1872; 5 Chicago Legal News, page 253.

It is said, also, by plaintiff in error, that the township alone has the power, under the the Constitution of 1870, to subscribe and issue bonds, not the Supervisor and Clerk. The force of this is not apparent, inasmuch as the Constitution of 1870, retains by its provisions the prior law of March 25, 1869, in full force, and permits subsequent subscriptions and issuing of bonds in pursuance of prior proceedings under that law. The township too, purports, in these bonds, to have issued them, and that it did so through the proper agents designated in the law, either clearly appears from a proper construction of the act, or t is to be presumed in favor of the purchaser of the bonds. And

concerning the suggestion that the vote of August 21, 1869, was virtually abandoned or rescinded, there is no evidence in the record, as we have already discussed in a preceding point.

It does not seem to us that there is any force either, in the position taken, that this case falls within the rule of the Illinois Supreme court, concerning the creation of a debt against the corporation by others than regular corporate officers, without the assent of the voters being manifested in some manner. This has already been sufficiently answered. As to the mere issuing of bonds, the principles settled by this court have been too often declared to require repetition. We need cite only one other authority in which it is laid down ;

"The legislature may appoint special persons to issue the bonds. Bonds so executed and issued bind the county."

Sheboyan Co. v. Parker, 3 Wallace, 93, 96.

The plaintiff's counsel also seeks to avoid the force and effect of the estoppels which appear in this case. He says it was the Supervisor and not the town that received the certificate of stock. How the town could receive it except through some agent of the town, cannot be perceived. If the principal officer of the town was not a competent person to receive manually the evidence of the town's ownership of the stock, what officer would be ? It was duly filed in the proper office, and became the property of the town. It has never returned nor offered to return it. It still retains it. Neither has the town in any manner, by any corporate act in its town meeting or otherwise, voted to repudiate the stock, or refused to acknowledge its ownership. It is said that the supervisor was acting in complicity with the railroad. But the evidence does not justify this assertion. And even if it were so, can the town thus repudiate the acts of its own officers and set up his defaults or errors of judgment to the prejudice of the plaintiff in the suit below ? We think the decisions of this court hold that it cannot.

The estoppels on this town in this case may be enumerated as follows :

1. The recitals in the bonds, of the character which this court has so frequently held suffice to protect the bona fide purchaser.

2. The receipt of the stock certificate and retaining it, as the property of the town, and thereby ratifying the issue and delivery of the bonds and coupons.

3. The neglect to take any steps at any time to prevent the issue of these papers, and thereby permitting them to pass into the market as commercial paper.

4. The fact that these bonds and coupons were duly registered in the office of the State Auditor, upon the statement of the officer of the town, appointed by law to certify they were entitled to registry. In explanation of this, we quote from the statute of Illinois, concerning the registry of such securities.

"* * * The *Supervisor of the township*, or the chief "executive officer of the city or town, that shall have issued "bonds to any railway or railways, immediately upon the com- "pletion of the same near to, into, or through such county, "township, city or town, as may have been agreed upon, and "the running of the cars thereon, *shall certify, under oath*, "*that all the preliminary conditions in this act required* to be "done to authorize the registration of such bonds, and to entitle "them to the benefits of this act, *have been complied with*, and "shall transmit the same to the State auditor, with a statement "of the date, amount, number, maturity, and rate of interest of "such bonds, and to what company, and under what law, issued, "and thereupon the said bonds shall be subject to registration "by the State Auditor, as hereinbefore provided."

1 Gross' Stat., p. 556, Sec. 7, Act April 1, 1869.

By this statute it appears that the Supervisor of the township is directed to make affidavit that the conditions of the vote had been complied with. It appears in evidence by the certificate of the State Auditor that these bonds were duly registered in his office according to the provisions of this law. In order to be registered, the law required this affidavit of the Supervisor to be filed with the Auditor. It is to be presumed that he per-

formed his duty, and required this affidavit to be made before he certified to the registry of these bonds, and affixed the seal of the State, thereby apprising the world that they were entitled to credit. This was a public statute, and yet no officer or citizen of this town ever took any steps to prevent this registry, but permitted it to be done.

IX.

The next objection is that the coupons sued upon make no substantive cause of action, and are not negotiable paper. Exception is taken because the word "township" instead of "town" of Ohio is used. As a matter of fact, town and township are used in Illinois as synonymous terms when applied to municipal corporations organized under the township organization law. The counsel himself, in arguing his preceding point, sought to apply constitutional provisions about "townships" to the case of plaintiff in error. The constitutions of 1848 and 1870 use the term "township" in describing that class of towns, the latter instrument in Sec. 5, Art. X., saying, "No two townships shall have the same name, and the day of holding the annual *township* meeting shall be uniform throughout the State." The provisions of the funding act, or statute of 1869, sec. 7, 1 Gross' Stat., p. 556, refer to towns in the same way, and require "the Supervisor of the township that shall have issued bonds to any railway" to make a certificate under oath. The township organization law itself uses the term in the same manner, as for instance, "The Supervisor, Assessor and Town Clerk of every *township* shall constitute a board of health, etc., to remove any infected person to any pest house within the limits of said *township*, at the expense of said *town*." 1 Gross' Stat. 754, sec. 10. So, "in each and every county where they have *organized into townships*," the County Clerk is directed to prepare books for assessors. Art. 16, sec. 5, 1 Gross Stat., p. 760. So, "it shall be the duty of *township* collectors to make out an abstract of the amount of district road tax to each district of the respective *townships*." 1 Gross'

Stat. 763, sec. 30. So, "the legal voters of any *township* in the State, in counties where township organization has been or may hereafter be adopted, may, by a majority vote at their annual town meeting, provide that the road tax shall be collected in money only, to be expended by the commissioners of highways in such *townships*." 1 Gross' Stat., p. 766, sec. 9. Other instances *ad infinitum*, running all through the township organization law, might be cited to show that "town" and "township" mean one and the same thing, and that where either is used the corporation is correctly described.

Whether the name of "township" be correct or not, the objection presents the question of a mere misnomer or addition of the superfluous word "ship" to the corporate name of "Town of Ohio." We have already cited in a preceding point authorities to show that such misnomer or addition to the name of a corporation cannot affect its contracts or obligations, and that such addition is immaterial.

In the case of the *Board of Education v. Greenbaum*, 39 Ill. 614, the Supreme court say:

"The proper name of this corporation is 'The Board of "Education of the State of Illinois.' In the contract, words "are transposed, but the name and style remain substantially "the same. The same words are embraced in both names. It "is a settled principle that the *interpolation*, *omission* or *alteration* of some of the words going to make up the name of a "corporation is not material if it makes no essential difference "in their sense. Angell & Ames on Corp. 77. So this court held "in *Chadsey v. McCreery*, 27 Ills. 253, that the transposition, "alteration or omission of some words in the name of a corporation, consisting of several words, was immaterial, if it was "evident what corporation was intended. The suit is brought "against the corporation by its true name, with an averment "that the contract was executed by the name used in it. This "is the usual and formal mode of declaring on such contracts."

"In a suit, any such misnomer or variance from the cor-

"porate name may be explained in pleading and avoided by "proof."

Peake v. Wabash R. R. Co. 18 Ill. 90.

"A misnomer, or variation from the precise name of the "corporation, in a grant or *obligation by* or to it is not material, "if the identity of the corporation is unmistakeable, either from "the face of the instrument or from the averments and proof."

DILLON ON MUNICIPAL CORPORATIONS, p. 162, Sec. 121.

So, if the name be expressed by words which are *synonymous*, it is sufficient.

Angell & Ames on Corp., 9 Ed., p. 78, Sec. 99, Note 6.

A paper of a commercial character, and negotiable by the law merchant is not any the less negotiable because evidence and averments may be required for the purpose of identifying the matter. A note is perfectly valid as a negotiable instrument though signed only by the initials of the maker. He may use figures or a mark in lieu of his proper name. It is only a rule of pleading and evidence which requires averments and extrinsic proofs of identity.

Edwards on Bills * 150.

In *Hurd v. Culies*, 18 Ill. 189, it is said:

"It is immaterial as *to the obligation of the promise*, by what name or style the defendants executed the note. They may be sued upon it by their true names, and any apparent variance or inconsistency between the instrument and the names of the alleged makers, by reason of the name or style used, may be helped or *prima facie* avoided by an averment in the pleading that they executed the written promise by such name and style."

"Where bonds were issued in the name of 'The Town of "Perrysburg' instead of 'The Incorporated Village of Perrys-"burg,' the latter being the proper legal name of the corpora-"tion, it was held to be a mere misnomer, and that it did not "affect the validity or obligation of the bonds."

Fosdick v. Village of Perrysburg, 14 Ohio State, (N. S.) 473.

See also *Milford & Cillicothe T. Co. v. Brush*, 10 Ohio 111.

The proofs in this case are ample that the town of Ohio is the corporation which made these coupons. The bill of exceptions states that it was proved "that the defendant was a township in Bureau county, state of Illinois, and a municipal corporation under the general township organization laws of the state of Illinois, and had been such since the year 1850, and *that it transacted and transacts its business under and uses the corporate name of the town or township of Ohio, either one;* and that its territorial limits were and are the same as congressional township 18, N. R. 9, E. etc. The documentary evidence, the application, election notice and town record of the election also use these terms, town and township, indiscriminately. The town of Ohio having undertaken to transact its business under either the name of township or town of Ohio is estopped to deny its corporate liability under either name.

U. S. Express Co. v. Bedbury, 34 Illinois 466, 467.

The plaintiff's counsel says it is immaterial that the town transacted its business under and used either name, but the Supreme court of Illinois, in a somewhat analagous case, have ruled differently.

In a *quo warranto* case concerning the election of School Trustees, under a school law which fixed the corporate name as follows; "Trustees of schools of *township* —— *range* ——" according to the number, and gave the Trustee power to sue and be sued etc. by that name, in which suit the poll book of an election was offered in evidence, under which the defendant claimed title to the office, showing the returns of an election for "Trustees of Schools of *the town of Selby*" the court said, "on objection made by relators, the defendant proved that the town of Selby and township sixteen north, range ten east were the same territory, and that the township was called "the town of Selby," and that the former Trustees of that township had, before defendant's election, ordered that the school business of that township hould be done in the name of the "town of Selby." The poll book was admitted; we think it was properly admitted, the former

Trustees having required it, and there being nothing in the law to prohibit it."

People ex rel. v. Brewer, 20 Illinois 477.

School Law 1857, Sec. 23 and 1 Gross Stat. 690, Sec. 23.

The same reasoning applies to the case at bar. If these school trustees, having by law a fixed corporate name, could vary it by using one that was synonymous, there is no reason why the town of Ohio cannot use the equivalent name of township of Ohio, being, in meaning, the same territory and corporate body.

It is also objected that the coupons are not in form a negotiable instrument, nor are they certificates of indebtedness, signed in the manner required by the township law. The most casual glance at the law cited by the counsel, and which we have presented in full on a preceding page, will show that the certificate to be signed by the board of auditors has not the remotest connection with coupons issued under the act of March 25, 1869. The board of auditors do not issue certificates of indebtedness to the creditors of the town at all. They do not issue papers to be put in circulation. The only certificate which is made by them, is a sort of statement, "specifying the nature of the claim or demand, to whom the amount is allowed, and shall cause said certificate to be delivered to the town clerk of said town, to be by him kept on file for the inspection of any of the inhabitants of said town;" and all this relates only to their official acts in auditing ordinary town charges.

1 Gross' Stat. page 753; Sec. 7.

This is a very different affair from issuing coupons attached to bonds intended for circulation, and to raise money upon, which the act of March 25, 1869, empowers the Supervisor and Town Clerk to issue.

There is no point either in the objection that the coupons are in the form of orders or bills of exchange, upon the Supervisor. The law of March 25, 1869, by not prescribing any form, left to the Supervisor and Clerk to decide in what shape

the coupons should be made. Besides, by Section 1, Article 8, of the T. O. law, 1 Gross' 751, it is made the duty of the Supervisor to receive and pay over all moneys raised there in for defraying town charges. There is no treasurer of the town. The Supervisor holds its money. It was, therefore, eminently proper to draw the coupons upon the town's disbursing officer, the Supervisor. Suppose the town had to raise by taxation, the interest due on these bonds, who, beside the Supervisor, would have the power to pay the coupons as they were presented? The reference to the funding act also has no weight. That is an act whereby the State appropriates a certain proportion of the State taxes to help municipal corporations pay these debts, and the State treasurer disburses this State tax only.

He does not undertake to disburse the moneys which the town may be compelled to raise by town tax over and above what the donation from the State taxes fails to meet. An examination of this so-called funding act will show that it is only a mode of donating to the town a portion of the State taxes to assist it in paying its debts. If no State tax should happen to be raised in the manner provided by this law, the town would not thereby be relieved from the responsibility of providing for the payment of the annual interest. Any other view would saddle upon the State the duty of paying the indebtedness of cities and towns, a responsibility which neither this funding act nor any other law of Illinois contemplates.

But the objection made to the form of these coupons has been repeatedly settled and overruled. The same objection to a coupon in the form of an order that it showed no legal liability on its face, and that there was no authority to issue it, was made and overruled in

Supervisors of Mercer County v. Hubbard, 45 Illinois, 140, 142.

Johnson v. Stark County, 24 Ill. 75.

And in this court where the coupons were in the form of drafts or orders, very similar to these Ohio coupons, like objections were overruled.

Sheboygan Co. v. Parker, 3 Wallace, 94, 95.
Curtis v. Co. of Butler, 24 Howard, 435, 439.

And this court has also said:

"We think that the bonds in this case, with interest warrants annexed, are commercial securities, *though they are not in the accustomed forms of promissory notes or bills of exchange;* that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them, and that the original maker, under such circumstances, has no equity to prevent the recovery of the interest."

Moran v. Comrs. of Miami County, 2 Black, 731.

Coupons have now a settled, *commercial and negotiable character*, pass by delivery, and may be sued upon by the bearer and without producing the bonds.

Knox Co. v. Aspinwall, 21 Howard, 546.
Amey v. Mayor, 24 Howard, 371.
Woods v. Lawrence Co. 1 Black, 405, 413.
Aurora City v. West, 7 Wallace, 105.
Murray v. Lardner, 2 Wallace, 110.
Thomson v. Lee Co. 3 Wallace, 327.
City v. Lamson, 9 Wallace, 477.
Johnson v. Stark Co. 24 Illinois, 75, 92.
Mercer Co. v. Hubbard, 45 Illinois, 139, 142, 143.

And in Illinois, they are admissible in evidence under the common money counts.

Johnson v. Starke Co., 24 Ill. 75, 92.
Mercer Co. v. Hubbard, 45 Ill., 139, 143.

Although the bonds in this case are not obligations or specialties in the common law sense of the term, being without a penalty or under seal, yet they are negotiable instruments, payable to bearer, transferable by delivery, and now known as coupon bonds. They are not under seal because townships have no corporate seal, and are not required or empowered to use one. As has been said by the court of appeals of New York,

concerning these town bonds: "The towns do not have, and are not supposed to possess a common seal. There is no provision for the adoption of one or for its custody. * * The instruments are negotiable upon their face. The statute does not in terms direct them to be issued in a negotiable form, but it does not forbid it, and as public and commercial securities invariably contain words of negotiability, the supervisors were well warranted in issuing them in that form."

People v. Mead, 10 Smith, 24 N. Y. 123, 124, 125.
Woods v. Lawrence Co., 1 Black 399, 402, 413.
Amey v. Mayor, 24 Howard 371.
1 Parsons' Contracts 291 Sec. 14.
2 Redfield's Railway, 524 Sec. 2.
1 Gross' Statutes, p. 742. T. O. Law. Art. 2.

X.

Another objection is made, which we judge is not an open question in this court. It is alleged that there was no demand of payment of the coupons sued upon before suit brought, and therefore the action was premature. Now, the evidence as to demand in the bill of exceptions, is as follows:

"That the coupons sued upon were cut by the plaintiff from said bonds, and were presented by the plaintiff, and payment thereof demanded, at the office of the State Treasurer in Springfield, Illinois, where the same were payable by the terms of said bonds, prior to the commencement of this suit, and after said bonds matured, and that such payment was there refused for the want of funds; and it was further proved, that said defendant had not raised or appropriated any moneys or taxes for the purpose of paying said coupons, and had no funds at any time, nor at any place, for such purpose."

Here is direct proof of a demand at the place where the coupons were made payable. That it was competent to make the State Treasurer's office the place of payment has been fully sustained by this court in a case where it was objected that the

interest was made payable in New York city, instead of at the treasury of the city of Muscatine. This court held: "It was according to the general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract, does not depend upon the place of performance, but upon its scope and object."

Meyer v. City of Muscatine, 1 Wallace 391.

Counsel cites a case from 31 Ill. 532, in contravention of this doctrine. But reference to the case will show that the question in the case was whether the coupons drew interest without a demand at the city treasury, and whether interest was allowable without such demand. The case does not decide that the bringing of suit is not a demand. Besides, this ruling was with reference to a city, which has a treasury and a regular city treasurer's office for the disbursement of money. We notice that the counsel quotes and italicises as if it were in the decision, the words "until demand made, a city or town is not in default." There is no such language used by the court. Speaking of the city, the words are, "such a body is not in default." A township has no treasury, nor treasurer's office, nor any disbursing officer, except its supervisor, who is not required to keep open an office. The reasons which apply to the case of a city or county, for requiring presentment for payment at an office kept open for payment of its paper, do not apply to a township, which does not present such facilities to its creditors. Counsel says there was no law authorizing the bonds and coupons to be made payable at Springfield. But, on the other hand, there is no law forbidding it, nor is there anything in the nature of a township or the character of its officers even implying that its paper must be made payable, as in the case of cities or counties, at some designated office inside of its corporate limits.

This case and other cases in Illinois, however, do not decide that the commencement of a suit is not a sufficient demand.

On the contrary, it is held in Illinois, even in the case of a note payable on demand, that the commencement of a suit upon it is a demand.

Hall v. Jones, 32 Illinois 39.

"A promissory note payable on demand, as against the "maker, can be prosecuted to judgment without averring or "proving any demand. So if it is made payable at a particular "time and place it is not necessary to aver or prove a demand "at the place in order to a recovery."

Hunt v. Divine, 37 Illinois 144.

Wallace v. McConnell, 13 Peters 136.

We presume the court will follow its own rulings in this matter, as this is a question of commercial law—"bonds and coupons by universal usage and consent having all the qualities of commercial paper"—which the varying opinions of the State courts cannot affect or control, and which this court will expound for itself.

Supervisors v. Schenck, 5 Wallace 784.

Swift v. Tyson, 16 Peters 18.

Aurora City v. West, 7 Wallace 105.

These coupons in suit are not payable on demand; they fell due on January 1st, 1872, a day specified and certain. The only object of a previous demand upon paper payable on demand would be to claim interest on the coupons from such demand. But a demand is not necessary on a bill or note payable on a given day, like these coupons, in order to maintain this action. This question is fully settled in the coupon suit reported in

Aurora City v. West, 7 Wallace 105.

Vose v. Philbrook, 3 Story 336.

Again: No demand in this case was necessary at the township at all, from the fact that the town had no money there, nor anywhere, provided to pay these coupons. The law will not require the idle and unmeaning ceremony of a demand, when, as the evidence shows, the town had provided no means of payment. Treating these coupons as of the nature of drafts or bills, the rule is that if there are no funds in the drawee's hands at

the time they were drawn or at their maturity, presentation and notice are not necessary.

Wood v. Price, 46 Illinois 435.
Howes v. Austin, 35 Illinois 396.
Lawrence v. Schmidt, 35 Illinois 440.
EDWARDS ON BILLS, 491.

Counsel cites a case from 2 Greenleaf 121; but that case does not hold that demand of payment is necessary when the town has no funds. And that case, too, relates to the ordinary town order or warrant issued for ordinary municipal purposes, and not to negotiable paper like coupons. The distinction between the two classes of paper is pointed out in DILLON ON MUNICIPAL CORPORATIONS. That author says:

"Bonds issued by municipal corporations on time, "negotiable in form, and for sale in the market, under express "authority from the legislature are *negotiable*, with all the "qualities and incidents of negotiability. Such securities are "made to raise money by their sale, and this object would be "defeated if they were subject to equities, where the power to "issue exists, in the hands of bona fide holders.

But *ordinary city, county, and town orders and warrants* "are in some respects *different* from bonds of the character just "mentioned. * * Ordinary warrants or orders, negotiable "in form, may be made by the proper officers, and in many of "the States such instruments may be transferred by delivery or "endorsement, and the holder sue thereon in his own name, *yet* "*they are not commercial or negotiable paper in the hands of* "*innocent holders so as to exclude inquiry into the legality of* "*their issue, or preclude defences thereto.*"

DILLON ON MUNICIPAL CORP., Secs. 405. 406.

It is under this head of *ordinary town orders* that Judge Dillon cites the case of *Varner v. Noblebury*, 2 Greenleaf 121, in note 3 to sec. 410 of his work.

The question, however, as to the right of municipalities in Illinois to make their bonds, payable at some other place than the municipal treasury, was put at rest by the passage of laws

by the legislature, in 1857, which were intended to give this express authority. And these laws were in force when these Ohio bonds were issued. These amendments to the old interest law of the State are to be found in 1 Gross' Statutes, p. 371, 372. They are as follows:

"An Act to amend the interest laws of this State.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly, That where any *contract or loan shall be made in this State*, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful according to any law of the State of Illinois, it *shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or territory of the United States, or in the city of London, in England;* * * * And no contracts or loans which have been heretofore made or entered into, bearing an interest at a rate which was legal, according to the laws of this State, at the time when the same was made or entered into, shall be invalidated, or in anywise impaired or affected, by reason of the same having been made payable in any other State or Country."

Approved February 12, 1857.

In force under the Constitution of 1848, sixty days afterwards, on April 12, 1857.

Laws 1857, p. 1838. 1 Gross' Statutes (1869), p. 371.

Another law in force February 16, 1857, provides, "that it shall be lawful for any person or corporation borrowing money in this State, to make notes, bonds, bills, drafts, acceptances, mortgages, or other securities, for the payment of principal or interest, at the rates authorized by the laws of this State, payable at any place where the parties may agree."

Laws 1857, p. 33. 1 Gross' Stat. p. 372.

The law of 1869, commonly called the Funding Act, which provides for an appropriation of a certain proportion of State taxes to be paid by the State treasurer upon bonds and

coupons registered with him, requires the application of those taxes "to the payment of the annual interest on such regis- "tered bonds of such county, township, city or town, in the "*same manner as interest on the bonds of the State* is or *may* "*be collected and paid;*" and further provides for payment of these funds "upon the principal of the bonds, *on presentation* at the State treasury; and upon payment, the interest coupons or bonds are to be cancelled or destroyed by the State treasurer in the same manner as those appertaining to the State debt," etc.

Laws of 1869, April 1, Sec. 5. 1 Gross' Stat. p. 556.

The procedure under this law implies that bonds and coupons may be made payable at the State Treasurer's office, either in Springfield or in New York City. The words, "in the same manner as interest on the bonds of the State is paid," and the language used, show that the payment upon registered bonds and coupons by the State Treasurer is to be made by him at his office in Springfield or New York, and if so the legislature must have intended that the municipality had the right to make its paper payable at his office. It is a matter of general information that the bonds of the State of Illinois are payable at the State Treasurer's office in Springfield, or the branch office in New York City.

Since the passage of the laws in 1857, above quoted, it has never been disputed, that municipal corporations in Illinois could make their bonds payable elsewhere than at the municipal treasury.

The cases in Illinois, which hold that payment should be made at the municipal treasury, were all concerning bonds issued before any of the above laws were enacted. In the last one, cited by the opposite counsel, from 31 Illinois, 530, the bonds and coupons were issued on January 1st, 1857, several months prior to the passage of the acts of 1857, above quoted. In the opinion, these laws are not referred to by the court, and were either not brought to the court's attention, or else deemed inapplicable to the case, for the reason that such subsequent laws could not impair or affect the obligation of the prior contract.

Under these laws, it can hardly be claimed that a demand was not made, prior to the commencement of this suit, because the proof shows that such demand was made at the office of the State Treasurer, in Springfield, Illinois.

We claim, therefore, that whether the question be treated, as it is treated by this court, as one of commercial law, or as regulated by the existing legislation of the state of Illinois, there is nothing in this objection.

The last point made by the counsel for plaintiff in error, is, that the Circuit court allowed interest on the coupons after their maturity.

Here, again, for authority, the counsel professes to quote from two Illinois decisions, concerning cities. We have looked in vain in those decisions for the exact language, quoted ostensibly as the language of the court, but cannot find it. Towns, like those under township organization, are not even mentioned by the court. The case in 31 Ill., 532, refers, as we have already mentioned, to a city or county having a local treasury. The case in 56 Illinois, 334, was solely concerning the allowance of interest upon an account for work done on the streets in Chicago, was not a case where the city's negotiable paper was issued, and sheds no light upon the question.

Conceding, however, that counsel in his paraphrase of the real words used by the Illinois court, stated somewhat strongly, perhaps, has got the idea of that court, still we answer that this is purely a question of commercial law, to be governed by the practice and decisions of this court.

This court has said as follows :

"Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper. Coupons are written contracts for the payment of a definite sum of money on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the

bonds to which they were attached. Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day. Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand as other negotiable instruments, *it is quite apparent on general principles that they should draw interest* after payment of the principal is unjustly neglected or refused. Where there is a contract to pay money on a day fixed and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time. Governed by that rule, the court, in the case of *Gelpcke v. Dubuque*, held *that the plaintiff, in a case entirely analogous, was entitled to receive interest.*"

Aurora City v. West, 7 Wallace, 86, 105.
Gelpcke v. Dubuque, 1 Wallace 176, 206.

As coupons are negotiable and pass by delivery, and have all the qualities and incidents of commercial paper, as held in *Thomson v. Lee Co.*, 3 Wallace 331, there is no reason why coupons, like other notes or bills, should not draw interest after maturity.

The general interest statute of Illinois of 1845 is, "creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note or other instrument of writing; likewise on money withheld by an unreasonable and vexatious delay of payment."

1 Gross' Stat., p. 370, Cap. 54, Sec. 2.

It stands admitted in this record that the plaintiff in error wholly neglected to provide any funds to apply in payment of these coupons at any place, and thus comes within the rule laid down in the cases cited.

Counsel says the statute has been construed by the Illinois court.

The only statute in force when the bonds and coupons

upon which the case in 31st Ills. 530 passes, was the old interest law of 1845. The court was passing upon the force of that statute, if any, as if very evident from its citation from 1 Scam. 67, decided as early as 1832. The laws of 1857 were not before the court nor construed by it. The point made in the case was whether the coupons drew interest without proof of any demand. There was no demand anywhere proved. The court, on page 531, seems to admit that the coupons might after demand of payment draw interest. But the case before the court was one in which no demand at all was shown.

Now, in the case at bar, it is proved that a proper demand of payment was made at the place where these bonds and interest were specifically made payable, and that payment was refused for want of funds. And that the place of payment, even under Illinois rulings, could be fixed at Springfield by this town, we have already shown from the fact that the law of March 25, 1869, did not forbid it, and from the fact that the laws of 1857 and of 1869, quoted in the preceding point, gave the authority, either express or implied, to make the State Treasurer's office the place of payment. Having shown a demand there, and a refusal to pay, at the proper place sanctioned by the Illinois statutes in force when these bonds and coupons were issued, the town was put in default, and made liable for the interest on the coupons.

The supposed construction given by the court in 31st Ill. 534 to the interest law of 1845, under a state of facts showing no demand whatever, is inapplicable to this case, in which a proper demand has been proven, and the liability of the town to pay interest on its coupons shown, as is conceded by the court in the case cited.

So that, in either view, whether the coupons be considered as commercial paper, and, therefore, subject to interest after maturity, under the rule of commercial law, which this court construes for itself irrespective of State court decisions, or whether they be considered in the light of the Illinois decision,

we insist that the court did not err in assessing the interest upon these coupons after their maturity.

XII.

The town of Ohio, the plaintiff in error, voluntarily entered into the project, which resulted in the issue of the bonds and coupons in question. Its own citizens, living in an agricultural community, and being without any railroad facilities, for the purpose of obtaining the advantages of railway communication, put into action the powers conferred by the law of March 25, 1869. Without any outside interference, they called their own election, held it as the law directed, obtained a large majority of the whole number of the citizens, and induced the railroad company to accept the subscription offered, and to build a railroad in full reliance upon the good faith of this town. The railroad was built, in conformity with the conditions asked for by the voters, the bonds were then delivered to the company and permitted to pass unquestioned into the hands of innocent purchasers. This town cannot now, after waiting until the construction of this railroad through it, and after securing its benefits, and after it is in full operation as a railroad, repudiate the inducements which operated to build the road, and now seek to avoid payments of its bonds. The town waits until the bonds have passed, in the regular course of business into the stock market, into the hands of bona fide purchasers, who have paid their money, confiding in the validity of these negotiable securities, purporting to have been issued in conformity with law by the agents of this town, and endorsed as they are by the certificate of the State Auditor with his seal of office, and by the general current of judicial decisions, so numerous that they have become rules of property. In addition to all this, this town received and still retains its certificate of stock to the amount of $40,000 in the railroad company, and while still holding it, undertakes, after the lapse of eighteen months from the delivery of its bonds, to question its liability to pay them. It cannot

claim, in justification, that it has not received the consideration of its vote. It cannot aver that the railroad promised has not been constructed. It cannot say, it has not received the stock to the full amount to which it subscribed. It cannot claim that it has not been benefited by the construction of this railroad through its limits, when before it had no railway communication with desirable markets. Its conduct is without excuse, and smacks only of repudiation. It stands estopped confessedly by its own acts. The defendant in error, under all these circumstances, is entitled to all the protection heretofore extended by this court to the bona fide holders of this class of commercial paper. It is now too late for plaintiff in error to seek to take advantage of the irregularities alleged, if indeed they exist, in a suit begun a year and a half after these bonds were delivered, and after they have been sold all over the country. The plaintiff in error, if acting in good faith, should have proceeded to restrain the issue and delivery of the bonds and coupons in apt time. These propositions have been so often declared by this and other courts in the United States, that we deem it unnecessary to cite authorities.

XIII.

In this case the trial was by the court under the federal act of March 3d, 1865. The Circuit court found a general verdict on all the issues for defendant in error, and not a special one. The bill of exceptions, though it details the evidence in a condensed form, is no special finding of facts. The bill of exceptions presents no erroneous ruling, excepted to, *during the progress of the trial.* There is no special verdict or finding here, under which the sufficiency of the facts to sustain this judgment can be questioned. Neither does the record show that any propositions of law were presented to the court. Nor was any objection made on the trial to the admission or exclusion of evidence.

The plaintiff in error did not ask the court to make any special finding upon any question raised by its counsel. We do

not understand the statement in the bill of exceptions, that the court found the foregoing to be the facts and only facts, to be a special finding in the sense contemplated by the statute, nor to be anything but a statement equivalent to saying that the bill of exceptions contains all the evidence. The bill of exceptions shows the proof on both sides and does not profess to give, as an absolute finding, certain propositions as established. There was no case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court. The trial was without a jury, upon evidence pro and con, and this court must search the bill of exceptions to find out what that evidence is and its weight and effect. Upon this record is, then, the plaintiff in error entitled to question this judgment on either the law or the facts? If not, then the judgment below should be affirmed.

Norris v. Jackson, 9 Wallace, 125, 128.
Burr v. Des Moines Co., 1 Wallace, 102.
Flanders v. Tweed, 9 Wallace, 429.

It is insisted for the defendant in error, that the Circuit court did not err in its judgment, and that it should not be disturbed.

All the questions in this case were passed upon in the opinion of the learned judge who rendered the judgment of the Circuit court. By some oversight, the opinion of Judge Drummond has not been sent up with the record. It is published, however, in 5 Chicago Legal News, p. 351, copies of which we have filed with the clerk of this court.

The case is respectfully submitted for the defendant in error.

GEORGE O. IDE,
For Defendant in Error.

APPENDIX.

EXTRACT FROM ILLINOIS SUPREME COURT IN MARSHALL V. SILLIMAN.

We come, then, to the question whether the legislature can create a debt against a municipal corporation for municipal purposes, and subject it to a tax for its payment without its consent.

Our new constitution expressly prohibits this for the future and the decisions of this court substantially hold that it could not be done under the constitution of 1848. The 5th section of the 9th article of the constitution of 1848, provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, and such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. In *Harward v. St. Clair and Munroe Levee Drainage Co.*, 51 Ill., we held this clause was an implied limitation upon the power of the legislature to grant the right of corporate taxation to any but the corporate authorities. In the subsequent case of *The People ex rel. etc. v. The Mayor of Chicago*, Ib. 30, we went further, and held that although there might be cases where the legislature, without the consent of the corpopate authorities, might impose taxes local in their character if required by the general good government of the State, because such taxes would not be for corporate purposes merely, yet, the legislature could not compel a municipal corporation, against its own will, to issue bonds or incur a debt for a merely corporate purpose like the creation of a public park or local improvement. In the last cited case, the precise case under consideration was fully considered, and it is unnecessary to repeat what was there said. See, also, *Hepler v. Drainage Com.*, 53 Ill. 110, and *Livingston v. Wilder*, Ib. 302.

These cases show it to be the settled doctrine of this court that under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already

remarked, has received the sanction of express enactment in our existing constitution.

That was the effect of the curative act under consideration, and it was, therefore, void.

It is said, however, by counsel for appellee, that the legislature might have authorized the Town Supervisor and Town Clerk, as the corporate authorities of the Town, to subscribe to the stock of this road, and issue Township Bonds therefor, without a vote of the people, and that the curative act is to be considered as giving them that power, which they have duly exercised. The case of the *Town of Keithburg v. Trick*, 34 Illinois, 420, is cited in support of this position.

It was said in that case that the legislature might grant that power to the Trustees of a Town, if it thought proper to do so, without taking a vote of the people. We do not dissent from that position, but it does not aid the appellee in the present case. The Town Supervisor and Clerk who issued these bonds do not represent a Township, as the Board of Trustees represent an incorporate Town, or the Common Council represent a city. The Supervisor and Clerk are but a part of the corporate authorities.

They have no power of taxation, nor power of themselves to bind the city in any way. The case of *Livingston v. Wilder*, *supra*, may again be cited.

We said then that the police commissioners were not the corporate authorities of East St. Louis, as they had not been elected by the people of the city, nor appointed in any manner to which the people had given their consent, and therefore the Legislature could not give them the power of taxation by creating a debt binding upon the city. So of the Supervisor and Clerk. Though elected by the people, they are not elected for the purpose of creating a debt or imposing a tax, and the Legislature could not clothe these two officers without the consent of the people with a discretionary power of taxation, or of creating a debt, because they are not by themselves the corporate authorities in the sense of the constitution.

But even if these two officers could be recognized as the corporate authorities, they cannot be said to have voluntarily incurred this debt on behalf of the Town. The act gave them no discretion.

It declares the subscription shall be binding and may be collected.

It did not authorize the corporate authorities to subscribe

to the stock or not as they should think proper, but declared that an illegal vote should be a valid subscription and left to the Town authorities only the ministerial function of executing the behest of the legislature.

Counsel for Appellees claim that this case is like that of *Cowgill v. Long*, 15 Ill. 202. There is, however, a broad distinction. The Tax in that case was a valid Tax, and when the court say in their opinion that it was improperly voted in July, they evidently mean merely, that it was improperly voted in that month, for the purpose of collection during the current year. The Tax was legally imposed, and the only question decided by the court was, that the subsequent act of the legislature legalizing the steps by which the tax was illegally certified to the County court and placed in the course of collection during that year, was so far effectual that the tax could be collected by virtue of the act. The act dealt with a subject entirely under the control of the Legislature, namely the subject of remedy. The question before the court was very different from the ratification of a void Tax by a retrospective legislation, which the Legislature could not, of its own power, impose prospectively.

Our conclusion is that the so-called curative act was a violation of the constitution. Its object was to compel this Town to issue its bonds for Rail Road stock, independently of its own wishes, and this was beyond the limtis of Legislative power. It sought to accomplish this by declaring that a void proceeding was a valid one; that a vote confessedly illegal was in fact legal. But this vote was an accomplished fact. Whether it was within the corporative powers of the Town and binding upon its people, was a question which no subsequent legislation could affect, and when the legislature undertook to say that this vote created a valid obligation against the Town, when it did not, it was attempting by its own act to create a corporate debt. So far as the tax was assessed for the payment of interest on the bonds for $15,000, which we understand from the record were a distinct issue, it should have been enjoined, and if the bonds have not been negotiated the company should be required to surrender them.

The objections taken to the vote for the last subscription of $25,000 are not valid. The Town had, in the meantime, been authorized to subscribe to the amount of $100,000, and this last subscription was in substantial compliance with the law.